UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL,

and

Cases 37-CA-7311
37-CA-7334
37-CA-7422
37-CA-7448
37-CA-7458
37-CA-7476
37-CA-7478
37-CA-7482
37-CA-7484
37-CA-7488
37-CA-7537
37-CA-7550

HTH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7470

KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7472

PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7473

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142

BRIEFING ORDER

Pursuant to a conference call held this date, all parties participating, briefs are due on Wednesday, September 7, 2011, addressing the issue of whether it is necessary to reopen the record pursuant to the Board's remand in *HTH Corp.*, 356 NLRB No. 182 (June 14, 2011), as corrected July 11, 2011. Informing the scope of the issue to be addressed on brief are the following statements from the Board's decision remanding:

> The Union additionally excepts, arguing that the judge erred in failing to find that employees of the Shogun Restaurant, which the Respondents

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unilaterally closed, are entitled to reinstatement or other appropriate relief. (Slip op. at 2).

> Ordinarily, the Respondents' unilateral closure of the Shogun Restaurant and the layoff of the employees would warrant a remedy. However, in light of the limited record on this issue, and the lack of explanation for the General Counsel's disclaimer of a remedy, we shall remand this matter to the [Chief Administrative Law Judge, who may designate another judge in accordance with Section 102.36 of the Board's Rules and Regulations to prepare a supplemental decision][1] to determine whether a make-whole remedy is appropriate. [citation omitted, footnote omitted]. (Slip op. at 4-5).
>
> IT IS FURTHER ORDERED that the issue of the appropriate remedy for the Respondents' unilateral closing of the Shogun Restaurant and layoff of the restaurant employees is severed and remanded to the administrative law judge for further appropriate action consistent with this decision. (Slip op. at 10).

Additionally, Respondents' counsel noted during the conference call, that Respondents may argue that due to the General Counsel's waiver of a remedy for employees affected by the December 1, 2007, closure, it did not fully litigate the allegation that it unilaterally closed the Shogun Restaurant. This argument may also be briefed by the parties.

Briefs shall be filed in the NLRB e-Room by midnight PDT September 7, 2011. The e-Room designates the time of filing as the time of completion of transmission. Be warned that if one starts one's filing at midnight, it will likely show filing on the next day. Service on all parties as well as the San Francisco Division of Judges Docket Clerk (Doreen.Gomez@nlrb.gov) shall be completed by e-mail. No paper briefs need be exchanged.

SO ORDERED
Dated: August 3, 2011
San Francisco, CA

Mary Cracraft

Mary Miller Cracraft, Associate Chief
Administrative Law Judge

Served by e-mail:

Joseph F. Frankl (RD, Region 20)	Joseph.Frankl@nlrb.gov
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Dale K. Yashiki	Dale.Tashiki@nlrb.gov
Wesley M. Fujimoto	WFujimoto@lmanakakudo.com
Ryan E. Sanada	RSanada@lmanakakudo.com
Rebecca L. Covert	RCover@hawaii.rr.com

[1] From Correction dated July 11, 2011.

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PBC Employee List as of 11/25/07
(Bargaining No-Offer = 34)
(Sorted by Dept, Position, Last Name)

	EMP#	LAST NAME	FIRST NAME	DEPARTMENT	POSITION	DATE OF HIRE	RETIRED IN 2008
1	50339	MIYASHIRO	DARRYL I	BANQUET	WAITHELP	10/3/1992	
2	50401	PASALO	MAXIMIANO A	BANQUET KITCHEN	BUFFET FOOD RUNNER	10/22/2002	
3	50530	YADAO	WILLY	BANQUET KITCHEN	BUFFET FOOD RUNNER	5/12/2001	
4	50507	VALDEZ	ALEJANDRO	BANQUET KITCHEN	STEWARD	9/29/2005	
5	50244	KANAIAUPUNI	KEITH K	BELL	BELL PERSON	11/19/1983	3/10/2008
6	50348	MULKEY	KOHRY L	BELL	DOOR ATTENDANT	10/3/1999	
7	50242	KALUHIOKALANI	DELSON	BELL	PARKING VALET	3/23/2005	
8	50160	EUGENIO	SULPICIO B	GROUND/LANDSCAPING	GARDENER	4/7/2004	4/1/2008
9	50236	JOSE	EDDIE D	GROUND/LANDSCAPING	GARDENER	3/5/2003	
10	50404	PAZ	MARK	HOUSEKEEPING	CONTROL CLK	8/2/2005	
11	50002	ABELLA	ALFREDO A	HOUSEKEEPING	HOUSEKEEPER I	9/14/1996	4/3/2008
12	50052	BALISACAN	ZENIDA C	HOUSEKEEPING	HOUSEKEEPER I	8/17/1992	
13	50403	PAULINO	ESTRELITA	HOUSEKEEPING	HOUSEKEEPER I	4/7/2004	
14	50424	RECAIDO	VIRGINIA A	HOUSEKEEPING	HOUSEKEEPER I	4/27/1992	
15	50516	VILLANUEVA	RANDY S	HOUSEKEEPING	HOUSEKEEPER I	5/26/1993	
16	50073	BUMANGLAG	RUBEN R	MAINTENANCE	MAINT I	1/4/1996	
17	50216	HO	MARCUS C	MAINTENANCE	MAINT II	10/2/2006	
18	50518	WAGAS	DAVE WAYNE P	NEPTUNE'S KITCHEN	STEWARD	6/9/2004	
19	50207	HATANAKA	TODD N	OCEANARIUM	BARTENDER	11/23/1988	3/7/2008
20	50512	VERSOSA	JUDITO B	OCEANARIUM	BARTENDER	10/2/1991	3/31/2008
21	50426	REVAMONTE	VIRBINA G	OCEANARIUM KITCHEN	PANTRY I	12/13/1989	
22	50353	NAGAO	GARRICK	PURCHASING	PURCHASING CLK	3/16/1990	
23	50097	CAVIN	MICHAEL	SHOGUN	WAITHELP	4/16/1999	
24	50156	ENCABO	FELICIANO	SHOGUN	WAITHELP	5/5/2004	
25	50429	ROMERO	DOMINADOR A	SHOGUN	WAITHELP	4/29/2004	
26	50035	ARCALAS	ERWIN S	SHOGUN KITCHEN	COOK II	4/29/1994	
27	50053	BALLESTEROS	TEODORICO E	SHOGUN KITCHEN	COOK II	1/22/1990	
28	50086	CAJALNE	CESARIO O	SHOGUN KITCHEN	COOK II	10/16/1989	
29	50341	MIZOGUCHI	KEIZO	SHOGUN KITCHEN	COOK II	2/7/1993	
30	50470	TADA	KOICHI	SHOGUN KITCHEN	COOK II	12/10/2004	
31	50138	DELA CRUZ	DEXTER E	SHOGUN KITCHEN	COOK III	6/13/1991	
32	50552	GARAY	ARTURO S	SHOGUN KITCHEN	COOK III	8/14/1989	
33	50122	CORTEZ	DANILO	SHOGUN KITCHEN	STEWARD	2/15/1980	
34	50165	FERNANDO	TEODORO V	STEWARDS	STEWARD	5/9/1987	4/4/2008

APPENDIX 2

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Attachment "c"

RESPONDENT'S EXHIBIT 18

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL,

and

Cases 37-CA-7311
37-CA-7334
37-CA-7422
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37-CA-7537
37-CA-7550
37-CA-7587

HTH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7470

KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7472

PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7473

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142

COMPLAINT CONFORMED TO REFLECT ALL AMENDMENTS AS OF JANUARY 13, 2009

1. (a) The charge in Case 37-CA-7311 was filed by the Union on January 22, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(b) The first-amended charge in Case 37-CA-7311 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(c) The second-amended charge in Case 37-CA-7311 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(d) The charge in Case 37-CA-7334 was filed by the Union on March 16, 2007, and a copy was served by first-class mail on Respondents HTH on March 19, 2007.

(e) The first-amended charge in Case 37-CA-7334 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(f) The second-amended charge in Case 37-CA-7334 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(g) The charge in Case 37-CA-7422 was filed by the Union on August 31, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(h) The first-amended charge in Case 37-CA-7422 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(i) The charge in Case 37-CA-7448 was filed by the Union on October 25, 2007, and a copy was served by first-class mail on Respondents HTH on October 26, 2007.

(j) The first-amended charge in Case 37-CA-7448 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(k) The second-amended charge in Case 37-CA-7448 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(l) The charge in Case 37-CA-7458 was filed by the Union on November 8, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(m) The first-amended charge in Case 37-CA-7458 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(n) The second-amended charge in Case 37-CA-7458 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(o) The charge in Case 37-CA-7470 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondent HTH Corporation on November 23, 2007.

(p) The first-amended charge in Case 37-CA-7470 was filed by the Union on February 8, 2008 , and a copy was served by first-class mail on Respondent HTH Corporation on February 11, 2008.

(q) The second-amended charge in Case 37-CA-7470 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondent HTH Corporation on the same date.

(r) The charge in Case 37-CA-7472 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondent KM on November 23, 2007.

(s) The first-amended charge in Case 37-CA-7472 was filed by the Union on February 8, 2008, and a copy was served by first-class mail on Respondent KM on February 11, 2008.

(t) The second-amended charge in Case 37-CA-7472 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondent KM on the same date.

(u) The charge in Case 37-CA-7473 was filed by the Union on November 21, 2007, and a copy was served by first-class mail on Respondent PBC on November 23, 2007.

(v) The first-amended charge in Case 37-CA-7473 was filed by the Union on February 8, 2008, and a copy was served by first-class mail on Respondent PBC on February 11, 2008.

(w) The second-amended charge in Case 37-CA-7473 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondent PBC on the same date.

(x) The charge in Case 37-CA-7476 was filed by the Union on November 23, 2007, and a copy was served by first-class mail on Respondents HTH on November 26, 2007.

(y) The first-amended charge in Case 37-CA-7476 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(z) The charge in Case 37-CA-7478 was filed by the Union on November 23, 2007, and a copy was served by first-class mail on Respondents HTH on November 26, 2007.

(aa) The first-amended charge in Case 37-CA-7478 was filed by the Union on January 4, 2008, and a copy was served by first-class mail on Respondents HTH on January 7, 2008.

(bb) The second-amended charge in Case 37-CA-7478 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(cc) The charge in Case 37-CA-7482 was filed by the Union on November 29, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(dd) The first-amended charge in Case 37-CA-7482 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(ee) The charge in Case 37-CA-7484 was filed by the Union on December 5, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(ff) The first-amended charge in Case 37-CA-7484 was filed by the Union on December 11, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(gg) The second-amended charge in Case 37-CA-7484 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(hh) The charge in Case 37-CA-7488 was filed by the Union on December 11, 2007, and a copy was served by first-class mail on Respondents HTH on the same date.

(ii) The charge in Case 37-CA-7537 was filed by the Union on March 14, 2008, and a copy was served by first-class mail on Respondents HTH on March 17, 2008.

(jj) The first-amended charge in Case 37-CA-7537 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(kk) The charge in Case 37-CA-7550 was filed by the Union on April 3, 2008, and a copy was served by first-class mail on Respondents HTH on April 4, 2008.

(ll) The first-amended charge in Case 37-CA-7550 was filed by the Union on August 29, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

(mm) The charge in Case 37-CA-7587 was filed by the Union on May 15, 2008, and a copy was served by first-class mail on Respondents HTH on May 16, 2008.

(nn) The first-amended charge in Case 37-CA-7587 was filed by the Union on May 21, 2008, and a copy was served by first-class mail on Respondents HTH on May 22, 2008.

(oo) The second-amended charge in Case 37-CA-7587 was filed by the Union on July 17, 2008, and a copy was served by first-class mail on Respondents HTH on the same date.

GENERAL COUNSEL'S FIRST AND SECOND ALTERNATIVE LEGAL THEORIES, PARAGRAPHS 2-23: The entity described as Respondents HTH has been the continuous employer of bargaining unit employees at the Pacific Beach Hotel based on a joint employer relationship with PBHM or, in the alternative, based on a principal-agent relationship with PBHM:

2. (a) At all material times, Respondent HTH Corporation, a Hawaii corporation with its headquarters in Honolulu, Hawaii, has been engaged in the business of, *inter alia*, operating hotels providing food and lodging in Honolulu, Hawaii, on the Island of Oahu.

(b) At all material times, Respondent PBC, a Hawaii corporation with its headquarters in Honolulu, Hawaii, operated a hotel providing food and lodging in Honolulu, Hawaii, on the Island of Oahu, herein called the Pacific Beach Hotel or Respondents' facility.

(c) At all material times, Respondent KM, a Delaware limited liability company with its headquarters in Honolulu, Hawaii, has been engaged in the business of receiving revenues derived from business at the Pacific Beach Hotel.

(d) At all material times, Respondent PBC has been the sole member of Respondent KM.

(e) At all material times, Respondent HTH Corporation, Respondent PBC, and Respondent KM have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for each other; and have held themselves out to the public as a single-integrated business enterprise.

(f) Based on their operations described in subparagraph 2(e), Respondent HTH Corporation, Respondent PBC, and Respondent KM, collectively herein called Respondents HTH, constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(g) On or about September 7, 2006, Respondents HTH entered into an agreement, herein referred to as the Management Agreement, with PBH Management, LLC, herein individually called PBHM, for PBHM to operate the business of the Pacific Beach Hotel.

(h) On or about January 1, 2007, PBHM began operating the business of the Pacific Beach Hotel.

(i) On or about August 3, 2007, Respondents HTH notified PBHM that Respondents HTH would terminate the Management Agreement, effective on or about November 30, 2007.

(j) On or about August 10, 2007, PBHM and Respondents HTH publicly announced that Respondents HTH would begin operating the business of the Pacific Beach Hotel on or about December 1, 2007.

(k) On or about November 30, 2007, Respondents HTH terminated the Management Agreement and PBHM ceased operating the Pacific Beach Hotel.

(l) At all material times, from about January 1, 2007, until about November 30, 2007, Respondents HTH possessed and exercised control over the labor relations policy of PBHM and administered a common labor policy for employees employed at the Pacific Beach Hotel.

(m) (i) At all material times, from about January 1, 2007, until about November 30, 2007, PBHM and Respondents HTH were joint employers of the employees employed at the Pacific Beach Hotel.

(ii) In the alternative, at all material times, from about January 1, 2007, until about November 30, 2007, PBHM acted as the agent of Respondents HTH within the meaning of Section 2(13) of the Act for purposes of operating the Pacific Beach Hotel.

(n) On or about December 1, 2007, Respondents HTH began operating the business of the Pacific Beach Hotel, without PBHM, in basically unchanged form.

(o) At all material times since about August 15, 2005, Respondents HTH has been an employer of the employees employed at the Pacific Beach Hotel.

3. (a) During the 12-month period ending July 31, 2008, Respondents HTH, in conducting their business operations described above in paragraph 2, derived gross revenues in excess of $500,000.

(b) During the period of time described above in subparagraph 3(a), Respondents HTH, in conducting their operations described above in paragraph 2, purchased and received at the Pacific Beach Hotel, products, goods and materials valued in excess of $5,000, which originated from points outside the State of Hawaii.

(c) At all material times, Respondent HTH Corporation has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

(d) At all material times, Respondent PBC has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

(e) At all material times, Respondent KM has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. (a) At all material times, Corine L. Watanabe, f/k/a Corine L. Hayashi, has held the positions of President, Secretary, and Director of Respondent HTH Corporation, and President, Secretary, and Director of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(b) At all material times, John Hayashi has held the positions of Vice-President, Treasurer, and Director of Respondent HTH Corporation, and Vice-President, Treasurer, and Director of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(c) At all material times, Robert "Mick" Minicola has held the positions of Regional Vice President of Operations of Respondent HTH Corporation, and Regional Vice President of Operations of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

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(d) At all material times, until about November 30, 2007, Linda Morgan held the positions of Director of Human Resources and Community Relations of Respondent HTH Corporation, and Director of Human Resources and Community Relations of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(e) At all material times, from about December 1, 2007, Linda Morgan has held the positions of Corporate Director of Human Resources and Community Relations of Respondent HTH Corporation, and Corporate Director of Human Resources and Community Relations of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(f) At all material times, until about January 1, 2007, John Lopianetzky held the position of Food and Beverage Director of Respondent HTH Corporation, and Food and Beverage Director of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(g) At all material times, from about January 1, 2007, until about November 30, 2007, John Lopianetzky held the position of Consultant to PBHM and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(h) At all material times, from about December 1, 2007, John Lopianetzky has been an employee of Respondents HTH, held the position at the Pacific Beach Hotel facility of General Manager and has been a supervisor of Respondents HTH within the meaning of Section 2(11) of the Act and an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(i) At all material times, from about December 1, 2007, until an unknown date in August 2008, Monica Draper has been an employee of Respondents HTH, held the position at the Pacific Beach Hotel facility of Director of Human Resources and has been a supervisor of Respondents HTH within the meaning of Section 2(11) of the Act and an agent of Respondents HTH within the meaning of Section 2(13) of the Act

6. (a) The following employees of Respondents HTH, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(b) On August 15, 2005, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(c) At all material times from about August 15, 2005, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Unit.

7. (a) At various times during the months of January 2006 through December 2006, Respondents HTH and the Union met for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

(b) During the period described above in subparagraph 7(a), Respondents HTH engaged in the following conduct: Bargaining with no intention of reaching agreement.

(c) By its overall conduct, including the conduct described above in subparagraph 7(b), Respondents HTH has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

8. (a) At various times during the months of January 2007 through November 2007, PBHM and the Union met for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

(b) Since about April 17, 2007 and May 30, 2007, respectively, the Union, by letters, has requested that Respondents HTH furnish the Union with the information listed in Attachment A, as modified in Attachment B.

(c) The information requested by the Union, as described above in subparagraph 8(b), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(d) Since about April 17, 2007 and May 30, 2007, respectively, Respondents HTH have failed and refused to furnish the Union with the information requested by it as described above in subparagraph 8(b).

9. (a) Since about September 11, 2007 and October 11, 2007, respectively, the Union, by letters, has requested that Respondents HTH furnish the Union with the following information:

1. Please identify the names of all bargaining unit employees

of PBH Management LLC as of August 10, 2007 and indicate with respect to each employee the following:

a. Date of hire
b. Position
c. Rate of compensation
d. Years of completed service with Pacific Beach Hotel
e. Accrued vacation benefits due as of November 30, 2007
f. Severance allowance benefits dues as of November 30, 2007
g. Date of birth, age, race and sex of employee
h. Names of employees who are receiving worker's compensation benefits? Please also list all employees who have received worker's compensation benefits in the past year.
i. Employees currently on sick leave or other leaves, the nature of their leave, and the period of their leave.

2. What terms and conditions will Pacific Beach Corporation seek in its hiring of the employees presently working at Pacific Beach Hotel?

3. Will substance abuse testing be required?

4. Will a probationary or orientation period be required?

(b) The information requested by the Union, as described above in subparagraph 9(a), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit

(c) Since about September 11, 2007 and October 11, 2007, respectively, Respondents HTH have failed and refused to furnish the Union with the information requested by it as described above in subparagraph 9(a).

10. (a) At various times during the months of January 2007 through November 2007, PBHM and the Union met for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

(b) On or about August 2, 2007, PBHM requested the consent of Respondents HTH to propose a collective bargaining agreement to the Union.

(c) On or about August 3, 2007, Respondents HTH notified PBHM that Respondents HTH would terminate the Management Agreement and, on or about November 30, 2007, Respondents HTH terminated the Management Agreement.

(d) By its conduct in subparagraph 10(c), Respondents HTH has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

11. (a) On or about September 2007, Respondents HTH implemented an application process and required its employees submit applications in order to keep and maintain their employment with Respondents HTH, effective December 1, 2007.

(b) On or about October 2007, Respondents HTH required its employees to undergo and pass drug testing as a term and condition of employment after November 30, 2007.

(c) On or about November 30, 2007, Respondents HTH permanently terminated certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are known to Respondents HTH.

(d) On or about December 1, 2007, Respondents HTH implemented a a 90-day "Introductory Period" for its employees.

(e) The subjects set forth above in subparagraphs 11(a), 11(b), 11(c), and 11(d) and below in subparagraph 11(g), relate to the wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for purposes of collective bargaining.

(f) Respondents HTH engaged in the conduct described above in subparagraphs 11(a), 11(b), 11(c), and 11(d) and below in subparagraph 11(g) without affording the Union an opportunity to bargain with Respondents HTH with respect to this conduct.

(g) On or about December 1, 2007, Respondents HTH hired certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are

known to Resopndents HTH, at an hourly wage lower than the hourly wage they received from PBHM.

12. On or about September 20, 2007, Respondents HTH, by Robert "Mick" Minicola, at 2490 Kalakaua Avenue, Honolulu, Hawaii, by counting employees, engaged in surveillance of employees engaged in union activities.

13. (a) On or about November 30, 2007, Respondents HTH discharged the employees named below:

Keith Kapena Kanaiaupuni

Darryl Miyashiro

Todd Hatanaka

Rhandy Villanueva

Virginia Recaido

Ruben Bumanglag

Virbina Revamonte

(b) Respondents HTH engaged in the conduct described above in subparagraph 13(a) because the named employees of Respondents HTH formed or joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

14. (a) At various times between about August 27, 2007 and December 3, 2007, including on December 3, 2007, the Union requested that Respondents HTH recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) From about December 1, 2007, Respondents HTH have failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

15. (a) On or about October 12, 2007, Respondents HTH, by issuing a "Declaration Statement – Conflict of Interest," promulgated and since then has maintained the following rule:

> DISCOURAGING POTENTIAL OR ACTUAL CUSTOMERS
> Any advice by any Pacific Beach Corporation employees, solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of Pacific Beach Corporation to aid another organization will be considered as an act of serious disloyalty and subject the employee to termination.

(b) Respondents HTH promulgated and maintained the rule described above in subparagraph 15(a) to discourage its employees from assisting the Union or engaging in other concerted activities.

(c) The subject set forth in subparagraph 15(a) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purpose of collective bargaining.

(d) Respondents HTH engaged in the conduct described above in subparagraph 15(a) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondents HTH with respect to this conduct.

16. (a) On or about October 12, 2007, Respondents HTH, by issuing a "Confidentiality Statement," promulgated and since then has maintained the following rule:

> Any information acquired by myself during the performance of my duties pursuant to my employment at, or in association with, or outside the scope of my employment, at the Pacific Beach Corporation, shall be regarded as confidential and solely for the benefit of Pacific Beach Corporation.

(b) The subject set forth in subparagraph 16(a) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purpose of collective bargaining.

(c) Respondents HTH engaged in the conduct described above in subparagraph 16(a) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondents HTH with respect to this conduct.

17. (a) On or about December 1, 2007, Respondents HTH implemented a wage increase of $1.00 per hour for housekeepers and banquet stewards.

(b) On or about December 1, 2007, Respondents HTH implemented a wage increase of $0.10 per hour for all tipping category employees.

(c) On or about December 1, 2007, Respondents HTH implemented a wage increase of $0.75 per hour for all Unit employees except housekeepers, banquet stewards, and tipping category employees.

(d) Until about November 30, 2007, PBHM and Respondents HTH, in their capacity as joint employers, required housekeepers to clean 16 rooms per day in the Pacific Beach Hotel's Ocean Tower or 15 rooms per day in the Pacific Beach Hotel's Beach Tower.

(e) At all material times since about December 1, 2007, Respondents HTH has required housekeepers to clean 18 rooms per day in the Pacific Beach Hotel's Ocean Tower or 17 rooms per day in the Pacific Beach Hotel's Beach Tower.

(f) The subjects set forth above in subparagraphs 17(a), 17(b), 17(c), and 17(e) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for purposes of collective bargaining.

(g) Respondents HTH engaged in the conduct described above in paragraphs 17(a), 17(b), 17(c), and 17(e) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondents HTH with respect to this conduct.

18. Since on or about December 1, 2007, Respondents HTH has maintained the following in its employee handbook:

(1) Page 39 of the handbook:

> If the media contacts you, please refer the inquiry to the General Manager's office immediately and inform your supervisor. It is important that you do not discuss your job or any aspect of the Company's operations or corporate business with the press or anyone not employed by our Company.

(2) Page 44 of the handbook:

It is the Company's policy to protect its property and sensitive information. Confidential information must not be used for any unauthorized purpose and must not be disclosed to any unauthorized person in or out of the Company. The unauthorized use or disclosure of confidential information constitutes a violation of company policy and will result in disciplinary action, up to and including suspension and/or discharge. "Confidential information" includes and is not limited to the following:

- Sales figures
- Marketing goals and/or margins
- Profit margins
- Merchandise mark-up
- All hotel reports such as sales reports, operating reports
- Names and addresses of employees and hotel guests
- Employee handbook

Your compensation also is confidential information and should not be discussed with anyone.

As a condition of your employment, you agree not to use or disclose, during the term of our employment and at all times thereafter, any confidential information about the Company, its operations, guests, customers and employees, except as authorized by the Company. When in doubt, act in the interest of non-disclosure and consult Human Resources.

(3) Page 51 of the handbook:

LEAVING PROPERTY DURING WORKING HOURS

Employees are not allowed to leave the property during work hours, including breaks and meal periods, unless it is for a work-related duty. Your immediate supervisor must authorize you to leave the property. You must "swipe out" when you leave the property and "swipe in" when you return to the property. Failure to abide by this rule will result in disciplinary action up to and including termination.

(4) "List of Unacceptable Conduct" on page 48 of the handbook prohibiting:

"Leaving the hotel or work areas during your working hours without the knowledge and prior consent of your supervisor."

(5) "List of Unacceptable Conduct" on page 49 of the handbook prohibiting:

"The making of derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation."

(6) Page 51 of the handbook:

EMPLOYEE ENTRANCE AND EXIT

. . . .

You may not be on Company premises earlier than 30 minutes prior to the onset of your scheduled shift. You must leave Company premises no later than 30 minutes at the end of your scheduled shift or final work. Exceptions to this rule must be approved in advance by your supervisor.

(7) Page 51 of the handbook:

ON PROPERTY DURING NON-WORK TIME

Employees are not allowed on Company property during non-scheduled workdays and hours without prior authorization and a property pass. You may not use company facilities more than one-half hour after your scheduled shift. The only exception is if you are using the 24 Hour Fitness Center facilities in which case you will be allowed two hours before or after your scheduled shift. You must submit your property pass request – which includes the date, hour and purpose for being on the property – in advance to your supervisor. The property pass must be authorized by your supervisor or the manager-on-duty.

When the property pass is approved, the supervisor/manager-on-duty must submit a copy of the pass to the Security department. The original form should be kept with the employee while on Company property. Failure to comply with this procedure will result in disciplinary action up to and including termination

(8) "List of Unacceptable Conduct" on page 48 of the handbook prohibiting:

"Arriving more than one-half hour prior to your scheduled start time and/or leaving more than one-half hour following the end of your shift without permission from your supervisor."

(9) "List of Unacceptable Conduct" on page 48 of the handbook:

Failure to obtain an authorized Property Pass to be anywhere on hotel premises during non-scheduled hours. (The one-half hour grace period before and after scheduled work hours shall be confined to Employees'

Entrance, Employees' Locker Room and Employees' Cafeteria). Employees will not be required to have a property pass to use the 24 Hour Fitness facilities at Pacific Beach Hotel (two hours before or after their shift).

(10) "List of Unacceptable Conduct" on page 48 of the handbook prohibiting:

"Loitering or straying into areas not designated as work areas, or where your duties do not take you."

(11) "List of Unacceptable Conduct" on page 49 of the handbook prohibiting:

"Discussing business, personal, or unauthorized matters in public areas where guests may be able to overhear the conversation."

19. Respondents HTH, by Minicola and Draper:

(a) About April 23, 2008, in the hallway outside the Pacific Beach Hotel's Housekeeping Department office and in the Human Resources Office, polled employees about their sentiments concerning the Union and/or Union activities.

(b) About April 25, 2008, inside Pacific Beach Hotel's Oceanarium Restaurant and in the Human Resources Office, polled employees about their sentiments concerning the Union and/or Union activities.

20. By the conduct described above in paragraphs 12, 18, and 19, and subparagraphs 15(a), 15(b), 16(a), Respondents HTH have been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

21. By the conduct described above in subparagraphs 7(c), 8(d), 9(c), 10(d), 11(c), 11(f), 11(g), 14(b), 15(d), 16(c), and 17(g), Respondents HTH has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and 8(a)(5) of the Act.

22. By the conduct described above in subparagraph 13(a), Respondents HTH have been discriminating in regard to the hire or tenure or terms or conditions of employment of its

employees, thereby discouraging membership in a labor organization in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

23. The unfair labor practices of Respondents HTH described above in paragraphs 20, 21, and 22 affect commerce within the meaning of Sections 2(6) and (7) of the Act.

GENERAL COUNSEL'S THIRD ALTERNATIVE LEGAL THEORY, PARAGRAPHS 24-41: The entity described as Respondents HTH is a successor employer to PBHM:

24. (a) At all material times, Respondent HTH Corporation, a Hawaii corporation with its headquarters in Honolulu, Hawaii, has been engaged in the business of, *inter alia*, operating hotels providing food and lodging in Honolulu, Hawaii, on the Island of Oahu.

(b) At all material times until about January 1, 2007, Respondent PBC, a Hawaii corporation with its headquarters in Honolulu, Hawaii, operated a hotel providing food and lodging in Honolulu, Hawaii, on the Island of Oahu, herein called the Pacific Beach Hotel or Respondents' facility.

(c) At all material times from about December 1, 2007, Respondent PBC, a Hawaii corporation with its headquarters in Honolulu, Hawaii, operated the Pacific Beach Hotel, providing food and lodging in Honolulu, Hawaii, on the Island of Oahu.

(d) At all material times, Respondent KM, a Delaware limited liability company with its headquarters in Honolulu, Hawaii, has been engaged in the business of receiving revenues derived from business at the Pacific Beach Hotel.

(e) At all material times, Respondent PBC has been the sole member of Respondent KM.

(f) At all material times, Respondent HTH Corporation, Respondent PBC, and Respondent KM have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for each other; and have held themselves out to the public as a single-integrated business enterprise.

(g) Based on their operations described in subparagraph 22(f), Respondent HTH Corporation, Respondent PBC, and Respondent KM, collectively herein called Respondents HTH, constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(h) On or about September 7, 2006, Respondents HTH entered into an agreement, herein referred to as the Management Agreement, with PBHM, for PBHM to operate the business of Pacific Beach Hotel.

(i) On or about January 1, 2007, PBHM began operating the business of Pacific Beach Hotel.

(j) On or about August 3, 2007, Respondents HTH notified PBHM that Respondents HTH would terminate the Management Agreement, effective on or about November 30, 2007.

(k) On or about November 30, 2007, Respondents HTH terminated the Management Agreement and PBHM ceased operating the Pacific Beach Hotel.

(l) At all material times, from about January 1, 2007 until about November 30, 2007, PBHM was the employer of the employees employed at the Pacific Beach Hotel.

(m) On or about December 1, 2007, Respondents HTH assumed operations of the Pacific Beach Hotel from PBHM and since then has operated the business of the Pacific Beach Hotel in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of PBHM.

(n) Based on the operations described above in subparagraph 24(m), Respondents HTH has continued the employing entity and is a successor to PBHM.

25. (a) During the 12-month period ending July 31, 2008, Respondents HTH, in conducting their business operations described above in paragraph 24, derived gross revenues in excess of $500,000.

(b) During the period of time described above in subparagraph 25(a), Respondents HTH, in conducting their operations described above in paragraph 24, purchased and received at the Pacific Beach Hotel, products, goods and materials valued in excess of $5,000, which originated from points outside the State of Hawaii.

(c) At all material times, Respondent HTH Corporation has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

(d) At all material times, Respondent PBC has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

(e) At all material times, Respondent KM has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

26. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

27. (a) At all material times, Corine L. Watanabe f/k/a Corine L. Hayashi has held the positions of President, Secretary, and Director of Respondent HTH Corporation, and President, Secretary, and Director of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(b) At all material times, John Hayashi has held the positions of Vice-President, Treasurer, and Director of Respondent HTH Corporation, and Vice-President, Treasurer, and Director of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(c) At all material times, Robert "Mick" Minicola has held the positions of Regional Vice President of Operations of Respondent HTH Corporation, and Regional Vice President of Operations of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(d) At all material times, until about November 30, 2007, Linda Morgan held the positions of Director of Human Resources of Respondent HTH Corporation, and Director of Human Resources of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(e) At all material times, from about December 1, 2007, Linda Morgan has held the positions of Corporate Director of Human Resources and Community Relations of Respondent HTH Corporation, and Corporate Director of Human Resources and Community Relations of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(f) At all material times, until about January 1, 2007, John Lopianetzky held the the position of Food and Beverage Director of Respondent HTH Corporation, and Food and Beverage Director of Respondent PBC, and has been an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(g) At all material times, from about December 1, 2007, John Lopianetzky has been an employee of Respondents HTH, held the position at the Pacific Beach Hotel facility of General Manager and has been a supervisor of Respondents HTH within the meaning of Section 2(11) of the Act and an agent of Respondents HTH within the meaning of Section 2(13) of the Act.

(h) At all material times, from about December 1, 2007, until an unknown date in August 2008, Monica Draper has been an employee of Respondents HTH, held the position at the Pacific Beach Hotel facility of Director of Human Resources and has been a supervisor of Respondents HTH within the meaning of Section 2(11) of the Act and an agent of Respondents HTH within the meaning of Section 2(13) of the Act

28. (a) The following employees of Respondents HTH, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator,

maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(b) On August 15, 2005, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(c) From about August 15, 2005 until about January 1, 2007, based on Section 9(a) of the Act, the Union was the exclusive collective-bargaining representative of the Unit employed by Respondents HTH, and during that period of time, the Union was recognized as the representative by Respondents HTH.

(d) From about January 1, 2007 until about November 30, 2007, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the Unit employed by PBHM, and during that period of time, the Union was recognized as the representative by PBHM.

(e) Since about December 1, 2007, based on the facts described above in paragraph 24 and subparagraphs 28(a) and 28(d), the Union has been the designated exclusive collective-bargaining representative of Respondent HTH's employees in the Unit.

(f) At all material times since about December 1, 2007, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

29. (a) At various times during the months of January 2006 through December 2006, Respondents HTH and the Union met for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

(b) During the period described above in subparagraph 29(a), Respondents HTH engaged in the following conduct: Bargaining with no intention of reaching agreement.

(c) By its overall conduct, including the conduct described above in subparagraph 29(b), Respondents HTH failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

30. On or about September 20, 2007, Respondents HTH, by Robert "Mick" Minicola, at 2490 Kalakaua Avenue, Honolulu, Hawaii, by counting employees, engaged in surveillance of employees engaged in union activities.

31. (a) On or about the dates set forth opposite their names, Respondents HTH refused to consider for hire or hire the following applicants for employment scheduled to begin about December 1, 2007:

Keith Kapena Kanaiaupuni	--	October 2007
Darryl Miyashiro	--	October 2007
Todd Hatanaka	--	October 2007
Rhandy Villanueva	--	October 2007
Virginia Recaido	--	October 2007
Ruben Bumanglag	--	October 2007
Virbina Revamonte	--	October 2007

(b) Respondents HTH engaged in the conduct described above in subparagraph 31(a) because the named employees formed or joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

32. (a) At various times between about August 27, 2007 and December

3, 2007, including on December 3, 2007, the Union requested that Respondents HTH recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) From about December 1, 2007, Respondents HTH have failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

33. (a) On or about October 12, 2007, Respondents HTH, by issuing a "Declaration Statement – Conflict of Interest," promulgated and since then has maintained the following rule:

> DISCOURAGING POTENTIAL OR ACTUAL CUSTOMERS
> Any advice by any Pacific Beach Corporation employees, solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of Pacific Beach Corporation to aid another organization will be considered as an act of serious disloyalty and subject the employee to termination.

(b) Respondents HTH promulgated and maintained the rule described above in subparagraph 33(a) to discourage its employees from assisting the Union or engaging in other concerted activities.

34. On or about October 12, 2007, Respondents HTH, by issuing a "Confidentiality Statement," promulgated and since then has maintained the following rule:

> Any information acquired by myself during the performance of my duties pursuant to my employment at, or in association with, or outside the scope of my employment, at the Pacific Beach Corporation, shall be regarded as confidential and solely for the benefit of Pacific Beach Corporation.

35. Since on or about December 1, 2007, Respondents HTH, has maintained the following in its employee handbook:

(1) Page 39 of the handbook:

> If the media contacts you, please refer the inquiry to the General Manager's office immediately and inform your supervisor. It is important that you do not discuss your job or any aspect of the Company's operations or corporate business with the press or anyone not employed by our Company.

(2) Page 44 of the handbook:

It is the Company's policy to protect its property and sensitive information. Confidential information must not be used for any unauthorized purpose and must not be disclosed to any unauthorized person in or out of the Company. The unauthorized use or disclosure of confidential information constitutes a violation of company policy and will result in disciplinary action, up to and including suspension and/or discharge. "Confidential information" includes and is not limited to the following:

- Sales figures
- Marketing goals and/or margins
- Profit margins
- Merchandise mark-up
- All hotel reports such as sales reports, operating reports
- Names and addresses of employees and hotel guests
- Employee handbook

Your compensation also is confidential information and should not be discussed with anyone.

As a condition of your employment, you agree not to use or disclose, during the term of our employment and at all times thereafter, any confidential information about the Company, its operations, guests, customers and employees, except as authorized by the Company. When in doubt, act in the interest of non-disclosure and consult Human Resources.

(3) Page 51 of the handbook:

LEAVING PROPERTY DURING WORKING HOURS

Employees are not allowed to leave the property during work hours, including breaks and meal periods, unless it is for a work-related duty. Your immediate supervisor must authorize you to leave the property. You must "swipe out" when you leave the property and "swipe in" when you return to the property. Failure to abide by this rule will result in disciplinary action up to and including termination.

(4) "List of Unacceptable Conduct" on page 48 of the handbook prohibiting:

"Leaving the hotel or work areas during your working hours without the knowledge and prior consent of your supervisor."

(5) "List of Unacceptable Conduct" on page 49 of the handbook prohibiting:

"The making of derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation."

(6) Page 51 of the handbook:

EMPLOYEE ENTRANCE AND EXIT

. . . .

You may not be on Company premises earlier than 30 minutes prior to the onset of your scheduled shift. You must leave Company premises no later than 30 minutes at the end of your scheduled shift or final work. Exceptions to this rule must be approved in advance by your supervisor.

(7) Page 51 of the handbook:

ON PROPERTY DURING NON-WORK TIME

Employees are not allowed on Company property during non-scheduled workdays and hours without prior authorization and a property pass. You may not use company facilities more than one-half hour after your scheduled shift. The only exception is if you are using the 24 Hour Fitness Center facilities in which case you will be allowed two hours before or after your scheduled shift. You must submit your property pass request – which includes the date, hour and purpose for being on the property – in advance to your supervisor. The property pass must be authorized by your supervisor or the manager-on-duty.

When the property pass is approved, the supervisor/manager-on-duty must submit a copy of the pass to the Security department. The original form should be kept with the employee while on Company property. Failure to comply with this procedure will result in disciplinary action up to and including termination

(8) "List of Unacceptable Conduct" on page 48 of the handbook prohibiting:

"Arriving more than one-half hour prior to your scheduled start time and/or leaving more than one-half hour following the end of your shift without permission from your supervisor."

(9) "List of Unacceptable Conduct" on page 48 of the handbook:

Failure to obtain an authorized Property Pass to be anywhere on hotel premises during non-scheduled hours. (The one-half hour grace period before and after scheduled work hours shall be confined to Employees' Entrance, Employees' Locker Room and Employees' Cafeteria). Employees will not be required to have a property pass to use the 24 Hour Fitness facilities at Pacific Beach Hotel (two hours before or after their shift).

(10) "List of Unacceptable Conduct" on page 48 of the handbook prohibiting:

"Loitering or straying into areas not designated as work areas, or where your duties do not take you."

(11) "List of Unacceptable Conduct" on page 49 of the handbook prohibiting:

"Discussing business, personal, or unauthorized matters in public areas where guests may be able to overhear the conversation."

36. Respondents HTH, by Minicola and Draper:

(a) About April 23, 2008, in the hallway outside the Pacific Beach Hotel's Housekeeping Department office and in the Human Resources Office, polled employees about their sentiments concerning the Union and/or Union activities.

(b) About April 25, 2008, inside Pacific Beach Hotel's Oceanarium Restaurant and in the Human Resources Office, polled employees about their sentiments concerning the Union and/or Union activities.

37. By the conduct described above in paragraphs 30, 34, 35, 36 and subparagraphs 33(a) and 33(b), Respondents HTH has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

38. By the conduct described above in subparagraph 31(a), Respondents HTH has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

39. By the conduct described above in subparagraph 29(c), Respondents HTH failed and refused to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and 8(a)(5) of the Act.

40. By the conduct described above in subparagraph 32(b), Respondents HTH has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and 8(a)(5) of the Act.

41. The unfair labor practices of Respondents HTH described above in paragraphs 37, 38, 39, and 40 affect commerce within the meaning of Sections 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 11(c), 11(f), 11(g), 13, and 31, the General Counsel seeks a remedial order requiring that Respondents HTH pay quarterly compound interest on any monetary award.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 7 through 23, the General Counsel seeks an Order requiring Respondents HTH to: (1) make whole employee negotiators for earnings lost, if any, while attending bargaining sessions; (2) pay to the Union the costs and expenses incurred by it in the preparation and conduct of collective-bargaining negotiations during the period January 1, 2006 through November 30, 2007, such costs and expenses to be determined at the compliance stage of this proceeding; (3) bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry*, as the recognized bargaining representative in the Unit; (4) promptly have an upper management representative read the Notice to Employees to assembled employees on work time; and (5) mail any Notice to Employees that may issue in this proceeding to those employees who were terminated by PBH Management on November 30, 2007, and who were not hired by Respondents HTH on December 1, 2007. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

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THE WITNESS: They made that 50 percent Guaranteed Owner Payment.
MR. VASCONCELLOS: Yes?
THE WITNESS: Yes.
BY MR. VASCONCELLOS
Q. And 6.2 of that same article, it gives you the calendar dates in which they make their payments?
MR. FUJIMOTO: He said one question, Your Honor.
MR. VASCONCELLOS: I said "very few."
THE WITNESS: Okay.
Q. (By Mr. Vasconcellos) And they paid by those calendar dates, during the term?
A. I can't say for sure.
Q. All right. And the Guaranteed Owner Payment is based upon a pro forma operating budget attached as Exhibit D, if you look at 6.1?
A. That is correct.
Q. And that Exhibit D is that same document that you referred to as -- at page Bate Stamp 0072?
MR. FUJIMOTO: Your Honor, I'm going to object to this line of questions. I don't know where we're going to go with this.
JUDGE KENNEDY: Yeah, I don't think it matters, counsel, at this point.

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THE WITNESS: We weren't in business for the guaranteed payment.
JUDGE KENNEDY: Let's just stop. I think we're kinda done here. I think everybody has their shot here about the businesses, and all of that.
MR. VASCONCELLOS: Well, I did have one area that I would like to refer him to.
JUDGE KENNEDY: Well, I don't care, at this point. I think we're basically done here with all of that. Everybody's had their crack at dealing with the business documents.
So, I think everybody's done here.
You can step down, sir.
MR. FUJIMOTO: For the record, Employer Respondent rests.
JUDGE KENNEDY: Respondent rests? All right.
Now we get to the question of rebuttal.
Ms. Yashiki, is the General Counsel going to have any rebuttal?
MS. YASHIKI: May I have just a moment?
JUDGE KENNEDY: You may. Why don't we take 5, 10 minutes right now, and we'll be off.
MS. YASHIKI: Great. Thank you.
(Recess at 4:30 p.m.)
MS. YASHIKI: Your Honor, Mr. Fujimoto,

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Respondents, and Counsel for the General Counsel, and the Counsel for the Union have agreed to -- have stipulated that the Offer Letters to 67 Room Attendants, 28 Utility Personnel, and 5 Laundry Personnel are all dated October 12th.
JUDGE KENNEDY: 28 Utility and 5 Laundry?
MS. YASHIKI: Yes. 67 Room Attendants, 28 Utility and 5 Laundry.
JUDGE KENNEDY: All dated -- when?
MS. YASHIKI: All dated October 12th 2007, with the exception of one offer to Mr -- and I'm going to spell his name, because I don't know how to pronounce it -- A-N-O-U-S-O-N-E, last name is -- looks like Sisavang, S-I-S-A-V-A-N-G.
And his Offer Letter is dated October 16th.
That is the only exception.
JUDGE KENNEDY: Okay. The stipulation is approved.
MR. VASCONCELLOS: Exhibit Number.
MS. YASHIKI: We also offer GC Exhibit 79, which is -- may I approach, Your Honor.
JUDGE KENNEDY: You may.
MS. YASHIKI: GC Exhibit 79 consists of three Offer Letters, one to Mr. Connie Hose, one to Benita Pagador, and one to Oscar Laxa, L-A-X-A.

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And these are part of the stipulated documents that I had just described.
JUDGE KENNEDY: Okay.
MS. YASHIKI: And --
JUDGE KENNEDY: These are exemplars of the stipulation?
MS. YASHIKI: They are. The date of acceptance at the bottom of these documents are the earliest dates that exist in the stipulated documents.
JUDGE KENNEDY: Okay.
MS. YASHIKI: And the acceptance dates at the bottoms of the other stipulated documents are dates after October 16th.
JUDGE KENNEDY: Okay.
MS. YASHIKI: 2007.
JUDGE KENNEDY: Okay, let me get that down here a second. I have the one that's the 13th is probably the earliest one?
MS. YASHIKI: Yes. The earliest one is the 13th, and the two other ones are dated October 16th.
JUDGE KENNEDY: Okay.
MS. YASHIKI: 2007.
JUDGE KENNEDY: All right.
MS. YASHIKI: And may I offer them into evidence?

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APPENDIX 4

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JUDGE KENNEDY: Any objection to that, received by stipulation?

MR. FUJIMOTO: Your Honor, no objection to it.

But based upon the reference to the previous letters, the offer letters and dates, that these examples of the dates are to be used solely for the purposes of the designation of dates of the offer letter and the dates of the acceptance.

JUDGE KENNEDY: All right. Anything else?

MS. YASHIKI: Yes. I spoke with Mr. Fujimoto, and --

JUDGE KENNEDY: Did I declare 79 received? 79 is received.

(GC Exhibit 79 in evidence.)

MS. YASHIKI: Thank you, Your Honor.

BY MS. YASHIKI

Q. I spoke with Mr. Fujimoto and expressed a concern that reviewing the transcripts of the first portion of our proceedings, it was not clear in the record that GC 52, which is a packet of employment documents -- it wasn't clear that the Respondents agreed that these were the documents that were provided in an employment packet form to all of the newly-hired employees.

JUDGE KENNEDY: Provided to all those who were

offered? Who did what, now?

Who were actually hired?

MS. YASHIKI: Yes. They were -- this is the new employee hire packet.

JUDGE KENNEDY: Okay. Now, that was the purpose behind it?

MS. YASHIKI: That's correct.

And Mr. Fujimoto, I believe, has stipulated that these documents were provided to all of the employees re-hired during the re-hire process.

JUDGE KENNEDY: That's an exemplar of what happened, is that right?

MS. YASHIKI: Yes.

JUDGE KENNEDY: Mr. Fujimoto, you're in agreement with that?

MR. FUJIMOTO: That's correct.

JUDGE KENNEDY: Okay. That was just a clarification. Anything further?

MS. YASHIKI: One final matter, Your Honor.

With regard to Respondent's Exhibit 18, Counsel for the General Counsel would like to state for the record that the Respondent's Exhibit 18 represents those individuals we believe are entitled to some form of remedy because they were not re-hired, with the exception of individuals Number 23 through 32 on this

list.

JUDGE KENNEDY: That is because?

MS. YASHIKI: And that is because we did not allege that the Shogun employees were entitled to remedy.

Number 33 -- although Number 33 is listed as a Shogun Kitchen Department employee, his position is as a steward. And it is our understanding that Mr. Danilo Cortez, D-A-N-I-L-O, C-O-R-T-E-Z, is more akin to a steward rather than assigned to the Shogun Restaurant; and therefore, we believe that Mr. Cortez is entitled to remedy.

And that's the reason why we are representing that numbers 23 -- individuals numbered 23 through 32 on this list are not entitled to remedy.

JUDGE KENNEDY: I see. All right.

MS. YASHIKI: And that is entitled to remedy today, pursuant to Paragraph 11(c) of the complaint -- the latest version the complaint.

JUDGE KENNEDY: Okay.

MS. YASHIKI: There is one more item that I just dawned on me, Your Honor.

And that is, I know we alleged in 11(g), I think it was, that Your Honor mentioned that there were some individuals who were hired at a lower hourly wage

than they had previously gotten, and those individuals we have not identified, we have not attempted to identify yet. And I have not asked Mr. Fujimoto for any assistance to identify these individuals yet.

And we request that perhaps that portion of it might be left to Compliance.

I mean, we can attempt --

JUDGE KENNEDY: Well, if they're entitled to a remedy, I guess that would be a compliance issue.

MS. YASHIKI: Oh, yes. Yes.

JUDGE KENNEDY: Okay. That's it?

MS. YASHIKI: That would be our request.

And that's it.

JUDGE KENNEDY: Let me just clarify something with the court reporter.

Cassie, I'm looking at some exhibits here -- some exhibits that were marked, anyway.

77, which are apparently notes of Kaneshige's.

And 78, PB Corp Management Agreement, those were not offered, is that what happened with that?

(Discussion off the record)

MS. YASHIKI: May we just double-check that.

We have received -- that you have received into evidence GC exhibits 1 through --

JUDGE KENNEDY: Let me get them out here, so I

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can look and see. I've gone down my chart here, and everything I have was checked off now. So, it's all been received from the General Counsel.

(GC Exhibit 77 in evidence.)

I have Joint Exhibits as checked off. And now, I need to find my chart for the Respondents that was out here for a minute and probably got buried.

MR. FUJIMOTO: I think there is one document that hadn't been received.

JUDGE KENNEDY: We have Respondent's 1 through 21. There was a union flier that was put on hold for a while, and I have not dealt with it since. And I don't think anybody cares, so that's never been offered, really.

Then there's the offers of proof, and 12 and 12(a) which were put in the Rejected Exhibits File.

And everything else, as far as I can tell, has been received. So, that's that.

All right. I guess I need to go off a record here and get a calendar. We'll be off.

(Recess.)

JUDGE KENNEDY: All right. In due time, I'll issue and file with the Board my decision in this matter.

I'm going to allow for April 3, 2009 as the

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due date for the -- for any briefs that anyone wishes to file. I have to confess that I'm not keeping up very well with all of the convenient electronic filing rules that are floating around out there, but I think that if you want to file it electronically, you can. There used to be a page limit on there, I'm not sure whether they've taken that off or not.

I will say this, though, I would like us to get some hard copies somewhere. I don't want to have to copy them, and particularly if they're a hundred pages long -- I don't want to see a 100-page brief -- but if there are hard copies, I use them to mark them up. And I don't want to have to print them out.

So, if somebody would mail three copies to the office, even if they file electronically, that would be helpful to me.

And the address, of course, is NLRB Division of Judges, 901 Market Street, Suite 300, San Francisco, California, 94103.

Now, as far as briefs are concerned, I'm not so sure that there's all -- that there is all that much that is in controversy, in terms of factual material here. There is not too much 'tis taint type of evidence here.

There is, of course, questions of how one

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interprets all of that evidence, but in terms of the credibility, or in terms of disputed facts, I just don't think there is that much there.

I do think that you're gonna need some law here and some good legal analysis with respect to the continued obligation to bargain; and secondly, with respect to the -- which entities are -- what the nature of the entities are, vis-a-vis themselves.

The General Counsel has kind of issued sort of a -- "whatever you find is good with me" kind of complaint, in terms of joint employer, and that sort of thing.

I think it would be preferable if you pick one, and kind of argue that, and give up the other ones if you don't think you can prove it.

And of course, if you do that, please notify the other parties, so that they don't have to write about something that you don't want to pursue.

And of course, we have some 8(a)(1) issues, rule issues, that are out there. I don't think you need to spend too much time on them, but they're out there.

I would like, however, for this case to never have to be decided. I would very much like it if some people would sit down and realize what is in their best

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business interests, and if they can do that, I think they can realize it.

Now, I don't -- you know, Mr. Minicola has been concerned about some of the issues in the contract, and with respect to union security.

And I would simply point everybody to the Supreme Court's decisions regarding that, what individuals may have a right to do.

They have the right to do whatever they wanna do, and within limitations, I mean, they can certainly exercise those rights. And I don't think there is any real concern or should be a concern from the company about that.

The company's got company interests in mind; employees have their own personal interests in mind, they can protect them. And of course, the union has its collective concerns. And I have no problem with all of that.

But I don't think that small issues, issues of individual preference, should be elevated to a point where they're blocking common sense.

And I can't make people do what I think is common sense, unless they think that it's common sense to them. So, I can't -- I don't predict where that will go, and I just urge that people take a second look

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at what it is that is standing in the way of an agreement of some sort. I just don't think it's that high a bar to get across.

And I know all counsel here in the room are fully familiar with what I'm talking about, and I just urge you all to think whether this is worth fighting down to the end.

I know that there is this issue of majority status that is bothersome to the company. And if it's that bothersome, I guess you know, we'll never get past it voluntarily.

But a little legal analysis probably will take everybody to what the real issue is there, and how important it is, and how stuck I am with it. I just don't have a choice.

So, if everybody has had their say now, let me see if there is anybody else that has anything else to say? Is there anything further?

MS. YASHIKI: Nothing further.

MR. VASCONCELLOS: Nothing for the union.

MR. FUJIMOTO: Nothing for the Respondent.

JUDGE KENNEDY: Well, my goodness.

It looks like I'm going to get out tomorrow, after all. Well, I thank you very much for your efforts, counsel.

I think, by the way, I do want to thank everybody here -- all the lawyers, in particular. The professionalism that has been shown in this proceeding has been remarkable, and I truly mean that. It's really been -- I'm very impressed with all of that.

And it appreciate it, it makes my job a lot easier. So thank you.

And with that, the hearing is closed.

(The hearing concluded at 5:02 p.m.)

CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 20, SubRegion 37, regarding HTH Corporation, Pacific Beach Corporation, and Koa Management LLC, et al., Cases 37-CA-7311, 37-CA-7334, 37-CA-7422, 37-CA-7448, 37-CA-7458, 37-CA-7476, C7-CA-7478, C7-CA-7482, 37-CA-7484, 37-CA-7488, C7-CA-7537, 37-CA-7550, 37-CA-7587, 37-CA-7470, 37-CA-7472 and 37-CA-7473, was held in Room 7245, 300 Ala Moana Boulevard, Honolulu, Hawaii on February 27, 2009, according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, and the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

Cassie Uyekubo CSR 293
Official Reporter

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

HTH CORPORATION, PACIFIC BEACH CORPORATION, and COA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL

and **Cases 37–CA–7311**
37–CA–7334
37–CA–7422
37–CA–7448
37–CA–7458
37–CA–7476
37–CA–7478
37–CA–7482
37–CA–7484
37–CA–7488
37–CA–7537
37–CA–7550
37–CA–7587

HTH CORPORATION d/b/a PACIFIC BEACH HOTEL

and **37–CA–7470**

KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL

and **37–CA–7472**

PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL

and **37–CA–7473**

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142

SUPPLEMENTAL DECISION ON REMAND

In HTH Corp., 356 NLRB No. 182 (June 14, 2011), the Board remanded the issue of whether a make-whole remedy is appropriate for "Respondents' unilateral closure of the Shogun Restaurant and the layoff of the employees. . . ."[1] Having fully considered the entire record as a whole, as well as the parties' briefs, I find that a make-whole remedy is not warranted under the circumstances of this case.[2]

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[1] 356 NLRB No. 182, slip opinion at 4-5.

[2] The underlying case was heard by Administrative Law Judge James M. Kennedy. At the time of this remand, Judge Kennedy had retired. By a Correction dated July 11, 2011, the Board remanded this issue to the Chief Administrative Law Judge who designated me to decide the issue on remand.

APPENDIX 5

On September 7, 2011, all parties filed briefs regarding the necessity for opening the record to address the issue remanded by the Board. I find that it is unnecessary to reopen the record because no additional facts need be elicited in order to decide the issue on remand.

Initially, I note that the amended consolidated complaint, as conformed, does not allege unilateral closure of Shogun Restaurant nor does it allege unlawful layoff of the Shogun Restaurant employees. Moreover, no underlying unfair labor practice charge was filed alleging failure to give the Union notice and an opportunity to bargain about the decision to close the restaurant.[3] At the conclusion of the underlying trial, counsel for the Acting General Counsel stated that there was no allegation that the Shogun employees were entitled to a remedy. Thus, on the final day of hearing, counsel stated:

> MS. YASHIKI: With regard to Respondent's Exhibit 18, Counsel for the General Counsel would like to state for the record that the Respondent's Exhibit 18 represents those individuals we believe are entitled to some form of remedy because they were not re-hired, with the exception of individuals Number 23 through 32 on this list.
>
> JUDGE KENNEDY: That is because?
>
> MS. YASHIKI: And that is because we did not allege that the Shogun employees were entitled to remedy. Number 33 -- although Number 33 is listed as a Shogun Kitchen Department employee, his position is as a steward. And it is our understanding that Mr. Danilo Cortez, D-A-N-I-L-O, C-O-R-T-E-Z, is more akin to a steward rather than assigned to the Shogun Restaurant; and therefore, we believe that Mr. Cortez is entitled to remedy. And that's the reason why we are representing that numbers 23 -- individuals numbered 23 through 32 on this list are not entitled to remedy.
>
> JUDGE KENNEDY: I see. All right.

The record reflects that these statements were made in the presence of Union Counsel Danny J. Vasconcellos, who represented the Union throughout these proceedings. Mr. Vasconcellos made no statement at all, either in agreement or disagreement, regarding counsel for the Acting General Counsel's statement that no remedy was sought for individuals affected by closure of the Shogun Restaurant. Further, at no time during the hearing did the Union assert that a remedy was requested for closure of the Shogun Restaurant.

In his decision, issued September 30, 2009, Judge Kennedy found that

> On December 1, 2007, Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an

[3] A charge filed alleging failure to bargain over the effects of the decision to close the restaurant was withdrawn.

> undetermined number of employees who worked in that restaurant, in violation of Section 8(a)(5) and (1) of the Act.[4]

Judge Kennedy did not provide a remedy for this finding of unilateral closure. No party filed exceptions to this Conclusion of Law. Moreover, in its brief on cross-exceptions to the ALJ Decision, counsel for the Acting General Counsel did not seek a remedy for closure of the Shogun Restaurant. Because no remedy was provided in Judge Kennedy's decision, it was unnecessary for Respondents to except to the Conclusion of Law. Nevertheless, the Union excepted to lack of a remedy for the finding that Respondents unilaterally closed the Shogun Restaurant. This was the first indication that anyone sought a remedy for the closure. Thereafter, Respondents noted in their answering brief to the Union's exception to the Board that they objected to any remedy for the closure of the Shogun Restaurant because on the final day of hearing counsel for the Acting General Counsel stated she was not seeking a remedy for these employees.

Thus in the absence of exceptions to Judge Kennedy's Conclusion of Law (above), the Board entered the following Amended Conclusion of Law:[5]

> 6. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act. . . .
> (g) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and discharged an undetermined number of employees who worked in that restaurant.

On remand of the remedy issue, counsel for the Acting General Counsel explained that it did not intend to litigate a violation concerning the closure of the Shogun Restaurant because no charge was filed regarding failure to give the Union notice and an opportunity to bargain over the decision to close the Shogun Restaurant. Counsel further notes that the decision to close the restaurant was not alleged in the amended consolidated complaint as a mandatory subject of bargaining. Due to these circumstances, at the end of the hearing counsel stated that there was no allegation that the Shogun employees were entitled to a remedy. Finally, counsel explains that the closure of the Shogun Restaurant was covered in testimony at the hearing only to the extent that it demonstrated that Respondents continued to be the employer of the employees even while PBH Management, LLC managed the hotel. My review of the pleadings and transcript indicates they are consistent with these assertions.

Respondents note on remand that the complaint did not allege any unfair labor practices regarding the former Shogun employees and the Union did not make a request for remedies for the Shogun employees until after the administrative law judge issued his decision and in spite of the fact that the Union did not object to counsel for the Acting General Counsel's disclaimer of remedies at the hearing or in its posthearing brief to the judge. Relying on *Sumo Container Stations,* 317 NLRB 383 (1995), Respondents argue that a remedy is not permissible under principles of due process because no notice was given: not only did the complaint not allege a violation but additionally the Acting General Counsel never argued such a violation. In fact, Respondents argue, because the Acting General Counsel disclaimed any remedy, imposition of a remedy is precluded.

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[4] 356 NLRB at 37, Conclusion of Law 15.

[5] 356 NLRB at 5.

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Respondents rely on *Holder Construction Co.*, 327 NLRB 326, n. 1 (1998) (Board declined to exercise its broad remedial authority to find remedy where General Counsel affirmatively disclaimed any intent to seek reinstatement for discriminatee, whose counsel remained silent regarding disclaimer at hearing and did not except to judge's failure to include a reinstatement remedy).

The Union characterizes the Board's Conclusion of Law as the "law of the case." Thus, the Union argues that the starting point for analysis on remand is that Respondents violated the Act by unilaterally closing the Shogun Restaurant and discharging employees who worked in the restaurant. The lack of a complaint allegation and disavowal of a remedy are therefore irrelevant at this point. That being the case, the Union argues that a remedy is warranted. The Union distinguishes *Holder Construction Co.*, 327 NLRB 304 (1998), asserting that a remedy is warranted because, unlike the discriminatees, it in fact filed exceptions to the failure to award a remedy.

However, in my view *Holder* is not distinguishable. First, in *Holder,* counsel for the General Counsel affirmatively disclaimed any intent to seek the typical reinstatement remedy for the two discriminatees. Neither discriminatee nor their counsel disagreed. The same is true here. Counsel for the Acting General Counsel affirmatively disclaimed any remedy for the Shogun Restaurant employees. Counsel for the Union did not disagree. Second, in *Holder,* no exceptions were filed to the judge's finding that two employees were discharged for their protected, concerted activity. The same is true here. No party excepted to the judge's unfair labor practice finding. I find that because no remedy was set out in the underlying decision, it is reasonable that Respondents did not file an exception to Judge Kennedy's conclusion of law. Finally, in *Holder,* the General Counsel, after affirmatively disclaiming a remedy during the trial, took exception to lack of a reinstatement remedy. Here, the Union, after acquiescing to the disclaimer of a remedy at hearing, took exception to the Board for lack of a remedy for closure.

In my view, there is no discernable difference between the General Counsel taking exception to lack of a remedy in *Holder* and the Union taking exception to lack of a remedy here. In either case, the appearance is that a party who agreed at hearing that a remedy was not being sought, simply changed its mind before the reviewing forum and requested a second bite of the litigation apple. However, it is clear that the parties knowingly proceeded throughout a lengthy trial without any allegation regarding the Shogun Restaurant closure. There was no viable unfair labor practice charge regarding the closure and at no time during the hearing did the Union urge a remedy for the closure. It was purposefully not litigated. The Board's broad remedial authority should not, in my view, extend in these circumstances. Thus, based upon *Holder,* I find that the circumstances do not warrant the exercise of the Board's broad remedial authority.

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CONCLUSION OF LAW[6]

A make-whole remedy is inappropriate under the particular circumstances here.

Dated: Washington, D.C. October 14, 2011

Mary Cracraft

Mary Miller Cracraft
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings and conclusions shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

DEC 23 2009

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL, and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL, and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,	CASE NOS.:	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587
	CASE NO.:	37-CA-7470
	CASE NO.:	37-CA-7472

APPENDIX 6
6-1

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,

Union.

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CASE NO.: 37-CA-7473

RESPONDENTS' ANSWERING BRIEF TO INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142'S CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE

Hearing:
Judge: James Kennedy
Date: November 4-12, 2008
February 19-27, 2009
Time: 9:00 a.m

RESPONDENTS' ANSWERING BRIEF TO INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142'S CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

In its cross-exception to the Administrative Law Judge's ("ALJ") Decision, the International Longshore and Warehouse Union, Local 142 ("Union") argued that the ALJ failed to include a remedy for employees who previously worked at the Hotel restaurant called Shogun, but lost their jobs when Shogun ceased operations. In its supporting brief, the Union specifically stated that the ALJ should have issued an order reinstating individuals numbered 23-32 on Respondents' Exhibit 18 (the Shogun employees).[1] *See Union's Brief in Support of Cross-Exceptions at page 7.* The Union's cross-exception should be denied for the following reason.

Near the conclusion of the hearing in this matter, the Counsel for the General Counsel specifically stated that it was not seeking any remedies for the former Shogun employees in this case. Specifically, the Counsel for the General Counsel clearly stated, "we did not allege that the

[1] The Union's brief actually listed individuals numbered 23-33. The individual listed as number 33, however, was a steward and not a former Shogun employee. *See Transcript of Proceedings at page 2324, lines 6-12* (hereinafter "*Tr. at page:lines.*").

6-2

Shogun employees were entitled to remedy." *See Tr. at 2324:3-5.* In clarifying this statement, the Counsel for the General Counsel specified that "individuals numbered 23 through 32 on [Respondents Exhibit 18] were not entitled to remedy." *Tr. at 2324:14-15.*

When explaining that certain individuals were not entitled to remedy, the Counsel for the General Counsel referred to the exact same set of individuals the Union is now claiming is entitled to remedy, right down to the exact same set of numbered individuals found on Respondents Exhibit 18. Clearly, the Counsel for the General Counsel waived any claims or remedies for the former Shogun employees. Therefore, it was not erroneous for the ALJ to decline to order any remedies for the former Shogun employees.

The Union's untimely attempt to amend an already amended complaint filed by Counsel for the General Counsel who already admitted no remedy alleged and sought for the numerically listed Shogun employees must be rejected. The Amended Complaint is not one which the Union can seek to amend.

The Union may attempt to make the argument that – despite representations by the Counsel for the General Counsel that the former Shogun employees are not entitled to remedy – the Shogun employees should nevertheless be entitled to remedy because their matter is closely connected and has been fully litigated. In the event the Union attempts to make such an argument, Respondents wish to take this opportunity to state that such an argument would be wholly erroneous.

First, the matter regarding the Shogun employees is not closely connected to any of the other matters that were litigated in these proceedings. Second, and more importantly, the issue regarding the Shogun employees were not "fully litigated." Clearly, as even the Counsel for the General Counsel acknowledged, the Shogun employees were not entitled to remedy. Therefore,

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the Counsel for the General Counsel did not present any evidence or arguments for why the Shogun employees should be entitled to remedy.

Correspondingly, Respondents never addressed the issue either, due to representations by the Counsel for the General Counsel that the Shogun employees were not entitled to remedy. Therefore, as neither the Counsel for the General Counsel nor Respondents addressed whether the Shogun employees are entitled to remedy during the proceedings in this matter, the matter clearly has not been litigated. Therefore, such an argument by the Union – if made – should be rejected.

Accordingly, the Union's cross-exception should be denied.

DATED: Honolulu, Hawaii, December 23, 2009.

IMANAKA KUDO & FUJIMOTO

WESLEY M. FUJIMOTO
RYAN E. SANADA
Attorneys for Respondents
HTH Corporation, Pacific Beach Corporation and
Koa Management, LLC, a Single Employer, dba
Pacific Beach Hotel

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6-4

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL, and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL, and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL, and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, Union.	CASE NOS.:	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587
	CASE NO.:	37-CA-7470
	CASE NO.:	37-CA-7472
	CASE NO.:	37-CA-7473
	CERTIFICATE OF SERVICE	

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, the foregoing RESPONDENTS' ANSWERING BRIEF TO INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,

LOCAL 142'S CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE was electronically filed with OFFICE OF EXECUTIVE SECRETARY in Washington, D.C., and a copy of the same was hand delivered to:

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DATED: Honolulu, Hawaii, December 23, 2009.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL,	CASE NOS. 37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550
and	
HTH CORPORATION dba PACIFIC BEACH HOTEL	
and	37-CA-7470
KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL	
and	37-CA-7472

APPENDIX 7

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PACIFIC BEACH CORPORATION dba
PACIFIC BEACH HOTEL

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL 142

37-CA-7473

RESPONDENTS' BRIEF REGARDING REOPENING THE RECORD; EXHIBITS A – D; CERTIFICATE OF SERVICE

RESPONDENTS' BRIEF REGARDING RE-OPENING OF THE RECORD

In its Decision and Order for the instant matter, dated June 14, 2011, the National Labor Relations Board ("NLRB") remanded this matter to the Administrative Law Judge ("ALJ") to determine the appropriate remedy, *if any*, for employees who formerly worked at the Shogun Restaurant at the Pacific Beach Hotel.

In his decision, the ALJ did not order any remedies for the former Shogun employees. Indeed, the Complaint giving rise to the instant matter did not allege that Respondents committed any unfair labor practices with respect to the former Shogun employees. Likewise, during the hearing before the ALJ, the Counsel for the General Counsel specifically stated that they were not seeking any remedies for the former Shogun employees. The International Longshore and Warehouse Union, Local 142 ("Union"), the Charging Party in this case, also did not request any remedies on behalf of the former Shogun employees during the hearing.

Yet, in exceptions filed *after* the ALJ issued his decision, the Union made a post-hearing request for remedies for the former Shogun employees. The Union made this request despite the fact that it did not object to the General Counsel's disclaimer of such remedies during the hearing before the ALJ, did not ask for such remedies during the

hearing before the ALJ, and did not ask for such remedies in its post-hearing brief to the ALJ. In response to the Union's exceptions, the Respondents objected to the request for such remedies, and noted that the General Counsel disclaimed any remedies for the former Shogun employees during the hearing before the ALJ.

Accordingly, as discussed in further detail below, the record in this case should *not* be reopened, because (1) the Complaint did not allege an unfair labor practice for the Shogun employees and (2) the General Counsel has already disclaimed and waived any right to seek remedies for the employees in question. *See Sumo Container Station, Inc.*, 317 NLRB 383 (1995)(rejecting ULP where complaint failed to allege charges with particularity) and *Holder Construction Co.*, 327 NLRB 326 (1998)(rejecting request for remedies where General Counsel disclaimed intention to seek such remedies).

Alternatively, if the record is reopened, Respondents' due process rights require that the parties be afforded an opportunity to litigate the issue of whether any unfair labor practices were committed with regards to the former Shogun employees in the first place.

The Record Should Not Be Reopened

The General Counsel and Union have had numerous opportunities to seek remedies for the former Shogun employees, but clearly made the deliberate choice not to do so. Therefore, it would be a violation of Respondents' due process right to impose remedies for the former Shogun employees at this late juncture.

Specifically, the instant matter stemmed from 16 different unfair labor practice charges that the Union filed against the Respondents in 2007 and 2008. One of those unfair labor practices – Case No. 37-CA-7478 – alleged that certain individuals were not rehired by the Respondents during a rehiring process conducted in October 2007. The

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original version of the charge alleged that 37 different individuals were not rehired, including 11 individuals who formerly worked at the Shogun restaurant. *See Exhibit A.* The charge was amended twice, however, and the names of the Shogun employees were *removed* from the charge. *See Exhibits B-C.* All three versions of the charge were signed by Danny Vasconcellos, the attorney representing the Union. *See Exhibits A-C.*

Accordingly, the Complaint did not allege that Respondents committed any unfair labor practices with regards to the former Shogun employees. *See Complaint.* As a result, the Respondents were not put on notice that the General Counsel considered any actions by the Respondents regarding the former Shogun employees to be violations of the National Labor Relations Act.

In addition, during the hearing before the ALJ, the General Counsel unequivocally stated "we did not allege that the Shogun employees were entitled to remedy." *See Transcript of Hearing, at 2324:3-5.* In clarifying this statement, the General Counsel stated that "individuals numbered 23 through 33 on [R18] were not entitled to remedy."[1] *Id. at 2324:14-15.*

Thus, not only did the General Counsel state that they were not *seeking* any remedies for the individuals, the General Counsel actually stated that such individuals "were not entitled to remedy." *Id.* The Union never objected to this position by the General Counsel. Based on such representations by the General Counsel, it was clear that no unfair labor practice was being pursued with regards to the former Shogun employees.

[1] A true and correct copy of R18 is attached as *Exhibit D.* The individuals identified that the General Counsel stated "were not entitled to remedy" include 11 individuals who formerly worked at the Shogun restaurant. These same individuals were also originally listed on the unfair labor practice charge form in Case No. 37-CA-7478, but were removed by the Union through amendments to the charge.

At this late juncture, the Union is seeking remedies for the former Shogun employees. Such remedies, however, are not permissible because the Complaint never alleged a violation of the Act with regards to the former Shogun employees. *See Sumo Container Station, Inc.*, 317 NLRB 383 (1995). In *Sumo Container*, the Board ruled that an ALJ improperly found that the respondent had committed an unfair labor practice, when the facts allegedly giving rise to the unfair labor practice had not been alleged or argued by the General Counsel. In reaching this decision, the Board noted that "the complaint not only failed to allege these matters with particularity, but also that there was no paragraph of the complaint that could be construed as reasonably comprehending them." *Id. at 384.*

The Board then concluded that "[u]nder these circumstances, we cannot find that the [r]espondent was on notice that these [allegations] would be sought by the General Counsel or considered by the Board as separate violations of the Act." *Id.*

The present case is very similar to *Sumo Container.* Specifically, there is no set of facts in the complaint alleging that the Respondents committed any unfair labor practices with regards to the former Shogun employees, nor is there any paragraph that can be construed as such. Thus, Respondents were not put on notice that they could be held liable for any conduct regarding the former Shogun employees.

In addition, the present case presents an even *more compelling* situation than *Sumo Container*, because the General Counsel expressly disclaimed any remedies for the former Shogun employees. This disclaimer of remedy precludes the imposition of any such remedies against Respondents with regards to the former Shogun employees. *See Holder Construction Co.*, 327 NLRB 326 (1998).

Specifically, in *Holder Construction,* the Board rejected the General Counsel's exceptions to an ALJ's decision not to provide a remedy requiring the respondent to offer reinstatement to two discriminatees. *Id. at 326.* In that case, the General Counsel tried to argue that the Board had authority under Section 10(c) of the Act to order reinstatement, even though such a remedy was never requested by the General Counsel. *Id.*

In dismissing this argument by the General Counsel, the Board noted that the General Counsel had disclaimed any intent to seek reinstatement for the two discriminatees. *Id.* Accordingly, the Board rejected the General Counsel's request for an order reinstating the two discriminatees. *Id.*

Likewise, in the present case, the General Counsel clearly and unequivocally disclaimed any remedies for the former Shogun employees. In fact, the General Counsel expressly stated that the former Shogun employees "were not entitled to remedy." During the hearing, the Union never objected to this position by the General Counsel.

Accordingly, because the Complaint did not allege a violation of the Act regarding the former Shogun employees and the General Counsel stated that those individuals were not entitled to remedy, no remedy should be issued for that issue in this case. *See White Coffee Corp.*, 261 NLRB 1025, 1026 (1982)("Since counsel for the General Counsel did not seek to amend the complaint in this regard, and indeed specifically stated that a remedy was not being sought with respect to the unfair labor practice strikers, the Administrative Law Judge erred in implicitly finding that [r]espondent violated Section 8(a)(3) and (1) by not reinstating the strikers after an unconditional offer to return to work and in providing a corresponding remedy.").

Because the General Counsel was not seeking remedies for the former Shogun employees, the issue regarding their employment was not litigated. As such, it would be improper for an ALJ to impose any type of remedy for the former Shogun employees. *See J.P. Sturrus Corp.*, 288 NLRB 668 (1988)(ruling that, because an issue was not litigated, there was insufficient evidence in the record to support the imposition of a remedy.).

Accordingly, the record should not be reopened to allow the General Counsel to litigate an issue regarding remedies that it has already stated are not warranted.

If the record is reopened despite the foregoing legal principles, however, the parties should be given an opportunity to litigate the issue regarding the former Shogun employees. Specifically, because the Complaint in this case did not seek an unfair labor practice regarding the former Shogun employees and the General Counsel disclaimed any remedies for those individuals, Respondents were not put on notice that any such violation could be alleged. *See Sumo Container* 317 NLRB at 384. Therefore, if the record is reopened for determining whether the Shogun employees are entitled to remedy, the record should also be reopened to determine whether there was any violation regarding the Shogun employees in the first place.

DATED: Honolulu, Hawaii; September 7, 2011

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL,

and

Cases 37-CA-7311
37-CA-7334
37-CA-7422
37-CA-7448
37-CA-7458
37-CA-7476
37-CA-7478
37-CA-7482
37-CA-7484
37-CA-7488
37-CA-7537
37-CA-7550
37-CA-7587

HTH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7470

KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7472

PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL

and

Case 37-CA-7473

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142

APPENDIX 8

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF TO ASSOCIATE CHIEF ADMINISTRATIVE LAW JUDGE REGARDING THE BOARD'S REMAND IN *HTH CORPORATION*

Submitted by:
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Counsel for the Acting General Counsel submits this brief in response to the Briefing Order issued on August 3, 2011 by Associate Chief Administrative Law Judge Mary Miller Cracraft (Judge Cracraft). In the Briefing Order, Judge Cracraft instructed the parties to submit briefs no later than Wednesday, September 7, 2011 "addressing the issue of whether it is necessary to reopen the record pursuant to the Board's remand in HTH Corp., 356 NLRB No. 182 (June 14, 2011), as corrected July 11, 2011." The Acting General Counsel's position is that reopening the record is not warranted.

The Board in HTH Corp. severed and remanded to the administrative law judge the issue of the appropriate remedy for the Respondents' unilateral closing of the Shogun Restaurant and layoff of the restaurant employees. In its Amended Conclusions of Law, the Board concluded that on December 1, 2007, the Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and discharged an undetermined number of employees who worked in that restaurant. The Board noted that the ALJ had found this violation and that the Union had taken exception to the judge's failure to provide these laid-off employees with a make-whole remedy.[1] The Board, citing Schnadig Corp., 265 NLRB 147 (1982), noted that once a violation of the Act has been established, it has full authority to fashion an appropriate remedy. However, the Board also noted the lack of explanation for why the General Counsel had specifically disclaimed any remedy for these employees.

The Acting General Counsel did not intend to litigate a violation concerning the closure of the Shogun restaurant, and consequently the decision to close the restaurant was not alleged in the Amended Consolidated Complaint as a mandatory subject of bargaining. No charge was filed over the Respondents' failure to give the Union notice and an opportunity to bargain over

[1] Respondents did not file any exception to the ALJ's finding, but in its reply to the Union's exceptions it objected to any remedy, noting that Counsel for the Acting General Counsel had on the final day of hearing stated that she was not seeking a remedy for these employees.

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Respondents' decision to close the Shogun. A charge was filed alleging Respondents failed to bargain over the effects of the decision but that charge was withdrawn. For these reasons, Counsel for the Acting General Counsel stated at the end of the trial that there was no allegation that the Shogun employees were entitled to a remedy.

The record does contain some testimony with regard to the closing of the Shogun. However this testimony was adduced at trial to provide the trier of fact a complete picture of the events that occurred at the time of the alleged violations, and to demonstrate, as subsequently upheld by the Administrative Law Judge and by the Board, that Respondents continued to be the employer of the Pacific Beach Hotel employees even while PBH Management, LLC managed the Hotel. Notwithstanding that the Board has the authority to find violations not alleged and to remedy them, in these circumstances, a remedy is not warranted. Accordingly, the Acting General Counsel has no further evidence or argument to present on this matter.

DATED at Honolulu, Hawaii, this 7th day of September, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of **Counsel for the Acting General Counsel's Brief to Associate Chief Administrative Law Judge Regarding the Board's Remand in *HTH Corporation,*** has this day been duly served upon the following persons by electronic mail at their last known electronic mail address as follows:

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Dated at Honolulu, Hawaii, this 7th day of September, 2011.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL, and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL, and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL,	CASE NOS.: 37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587 CASE NO.: 37-CA-7470 CASE NO.: 37-CA-7472

APPENDIX 9

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142,

Union.

CASE NO.: 37-CA-7473

RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; CERTIFICATE OF SERVICE

Hearing:
Judge: James Kennedy
Date: November 4-12, 2008
February 19-27, 2009
Time: 9:00 a.m

RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB") Rules and Regulations, as amended, Respondents HTH Corporation, Pacific Beach Corporation, and KOA Management, LLC (collectively "Respondents") take the following exceptions to the Decision issued by Administrative Law Judge James M. Kennedy on September 30, 2009 ("Decision").

A. Judge's Order for Respondents to recognize and bargain with the International Longshore and Warehouse Union, Local 142 ("Union") *(See Decision at 47:41-46)*

B. Judge's refusal to admit evidence of the Union's loss of majority support *(See Transcript of Proceedings, pages 1830-54; Decision at 39:4-17)*

C. Judge's finding that Respondents were not presented with an uncoerced disaffiliation petition *(See Decision at 39:13-14)*

D. Judge's finding that the Union has represented a majority of Hotel employees since August 15, 2005 *(See Decision at 45:19-20)*

E. Judge's finding that Respondents bargained in bad faith *(Decision at 45:26-27)*

F. Judge's finding that Respondents used PBH Management, LLC ("PBHM") as a middleman in a scheme to deprive employees of Union representation *(Decision at 45:33-36)*

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G. Judge's finding that Respondents cancelled the Management Agreement with PBHM for anti-union purposes *(Decision at 41:5-7 & 45:37-38)*

H. Judge's finding that Respondents were obligated to bargain with the Union while PBHM was in charge of the Hotel *(Decision at 45:28-32)*

I. Judge's finding that Respondents unlawfully withdrew from the Union on December 1, 2007 *(Decision at 45:43-45)*

J. Judge's finding that Respondents had a duty to provide information regarding negotiations while PBHM was in charge of the Hotel *(Decision at 46:23-28)*

K. Judge's finding that unilateral changes made by Respondents were unlawful *(Decision at 45:46 – 46:22)*

L. Judge's finding that Respondents discharged seven employees because of Union animus *(Decision at 46:30-34)*

M. Judge's finding that Respondents "polled/interrogated" employees *(Decision at 46:35-37)*

N. Judge's finding that Respondents threatened employees with job loss *(Decision at 46:40-44)*

O. Judge's decision to extend certification for one full year *(Decision at 44:4-5)*

P. Judge's decision to order extraordinary remedies *(Decision at 44:1-46 & 48:33 - 49:14)*

Q. Judge's decision to order a broad cease and desist order *(Decision at 44:33-35 & 47:6-37)*.

DATED: Honolulu, Hawaii, October 28, 2009.

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UNITED STATES OF AMERICA

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RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE

The Administrative Law Judge's ("Judge") refusal to allow the employees of the Pacific Beach Hotel ("Hotel") to testify at the hearing thereby depriving them of the opportunity to

exercise their Section 7 rights under the Act to state under oath that they did not want to join or be represented by the International Longshore and Warehouse Union, Local 142 ("ILWU" or "Union") was clearly erroneous and led the Judge to reach other erroneous findings and conclusions.

The Judge ordered Respondents (and therefore, the employees) to (a) recognize the ILWU as the exclusive bargaining representative of the Hotel employees and (b) bargain with the ILWU for one additional year despite actual proof that the majority of employees rejected the Union, as evidenced by a petition signed by 62% of the employees stating "We the employees of the Pacific Beach Hotel do not want to join the ILWU or any union." This petition was circulated and signed by Hotel employees in Spring/Summer 2008. The hearing in this matter was heard in November 2008 and February 2009, *after* the employees had already rejected representation by the ILWU. During the hearing, and for reasons that are still unclear, the Judge did not allow the Hotel employees to testify on the petition and their lack of support of the Union. After making the ruling excluding the testimony and evidence, the Judge issued his Decision ordering Respondents (and the employees) to recognize the Union and the employees to accept representation by a union they clearly do not support or want.

Specifically, during the hearing, employees were prepared to testify that the majority of Hotel employees did not want to be represented by the ILWU. The employees worked in the various departments throughout the Hotel, and had spoken with co-workers in their respective departments about the Union on several occasions. From speaking with their co-workers, it was clear that the general consensus at the Hotel was the employees did not want to be represented by the Union. The employees were disgruntled because the Union instigated two boycotts at the Hotel, and the Union hurt the employees instead of helping them. With this knowledge in mind,

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the employees circulated a disaffiliation petition stating they did not want to be represented by the ILWU, and that petition was signed by a majority of the Hotel employees.

When several of the employees attempted to testify at the hearing, however, the Judge ruled that the testimony regarding their anti-union sentiment and the petition was "irrelevant" to the proceedings. Despite repeated arguments by Respondents' counsel that such information was (a) clearly admissible and (b) relevant to the issue of whether the Union had majority support of the workforce, the Judge refused to allow such testimony into the record. In response, Respondents filed an *Offer of Proof, or in the Alternative, Motion in Limine*, to preserve its record.

Such evidence, however, was very relevant – and in fact, necessary – to the proceedings because it addressed the main issue in this case: Does the Union have majority support of the employees? If the Union did not have the support, Respondents could not be ordered to recognize and bargain with the Union; such an order would violate the Section 7 rights of the employees.

One of the main purposes of the Act is to protect the Section 7 rights of employees. *See Charbonneau Packing Corp.*, 95 NLRB 1166 (1951). This includes the rights of employees to either join or *refrain from joining* a labor organization. *See 29 U.S.C. § 157.* By signing the petition, the employees at the Hotel provided *actual proof* that the Union had lost the support of the majority of the employees. These employees were then prepared to present such testimony and evidence during the hearing. Contrary to Board law, however, the Judge ruled that such evidence was "irrelevant" to the proceedings.[1] The Judge created artificial legal hurdles to

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[1] Curiously, the Judge rejected such evidence *sua sponte*. Neither the General Counsel nor the Charging Party made an objection to such evidence.

justify his refusal to allow the testimony of the employees. Therefore, these employees were deprived of their right to testify, their voices were silenced, and their petition was in vain.

Accordingly, Respondents file these exceptions as it was clearly erroneous for the Judge to order Respondents and the employees to accept the ILWU as the employees' exclusive bargaining representative by first refusing to allow the employees to testify that they believed the Union had lost the support of the majority of the employees. By doing so, it appears the Judge had tipped his hand that he already planned to rule against the Respondents.[2] Such prejudicial actions in addition to other erroneous findings and conclusions were clearly erroneous and each will be addressed in detail below.

II. ARGUMENT

This brief addresses three sets of errors made by the Judge. First, the Judge erred by ordering Respondents to recognize and bargain with the Union, even though the Union is *not* supported by a majority of the employees. As discussed in detail below, 62% of Hotel employees signed a union disaffiliation petition that expressly stated they did not want to be represented by the Union and a number of the employees were able and willing to testify on their sentiment but were not allowed to do so by the Judge. This petition and disallowed testimony constitute proof that the Union lost the majority support of the employees. Therefore, it was erroneous for the Judge to order Respondents to recognize a Union that was not supported by the employees.[3]

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[2] Through his actions, it appears the Judge had already made up his mind that he would order Respondents to recognize and bargain with the Union, and he wanted to preclude any evidence that would prevent him issuing such an order.

[3] Respondents have filed an accompanying Motion to Remand and Reopen the Record pursuant to Section 102.48(d)(2) of NLRB Rules and Regulations. The Motion seeks an opportunity to submit testimony and evidence – from the employees themselves – that the majority of Hotel employees do not want to be represented by the Union.

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Second, the Judge also erred in finding that Respondents committed certain alleged unfair labor practices. The evidence in the record simply does not support the Judge's findings. Each of the Judge's errors are discussed in more detail below.

Third, the remedies ordered by the Judge were also erroneous. Even assuming *arguendo*, Respondents should be required to bargain with the Union, it should not be for one year. Additionally, the extraordinary remedies ordered by the Judge were neither proper nor warranted in this case.

A. It Was Erroneous For The Judge To Order Respondents To Recognize And Bargain With The Union, Because The Union Does Not Have Majority Support Of The Employees

The Judge has ordered Respondents to recognize a Union that is not supported by the majority of employees. By doing so, the Judge effectively ordered the employees to accept the Union as their exclusive bargaining representative – for a period of one year – despite their clear and unequivocal proclamation that they do not want to be represented by the Union.

To make matters worse, before making such ruling, the Judge also precluded a number of Hotel employees from testifying about the lack of employee support for the Union. Specifically, the Judge literally precluded any and all testimony or evidence that would have shown that the Union lost the majority support of employees. The Judge did allow, however, evidence from the General Counsel that the Union did have majority support of the Union at some point. The reasons for the Judge's evidentiary rulings are unclear; what is clear, though, is that such rulings were clearly erroneous. As a result, the Judge's order that the Respondents – and employees – must recognize the Union is also clearly erroneous, because it is based upon an incomplete and one-sided record.

1. The Judge Erred By Refusing to Admit Evidence of the Union's Loss of Majority Support

One of the main issues in this case was whether Respondents (and the employees) must recognize the ILWU as the exclusive bargaining representative of the Hotel employees. The ILWU's certification year expired in August 2006, and the ILWU's majority support by the Hotel employees has been a subject of great dispute. In this proceeding, the General Counsel and Union argued that the Union has not lost majority support of the employees, and therefore, should be recognized as the exclusive bargaining representative of the Hotel employees. The Respondents (and employees) countered that the Union has indeed lost majority support of the employees, as evidenced by numerous indicia, including a disaffiliation petition signed by 62% of the employees. Therefore, Respondents argued that it should no longer be required to recognize the ILWU as the exclusive bargaining representative of the employees.

During the hearing, the Union was permitted to submit evidence that the Hotel employees may have supported the Union at some point, including testimony about a petition that was purportedly signed by 70% of the Hotel employees in or about April 2006.[4] *Transcript of Hearing at 331:20* (hereinafter "*Tr. at page:line.*"). The Judge even made reference to this petition in his Decision. *Decision at 10:18-19.*

During the Respondent's case-in-chief, however, Respondents were not permitted to submit any evidence to the contrary. Specifically, Respondents were prepared to present evidence that the ILWU had lost majority support of the employees. *Tr. at 1830-1860 and Respondents' Exhibit 12* (hereinafter "*R-__.*"). For example, several Hotel employees were prepared to testify that the majority of employees at the Hotel did *not* want to be represented by

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[4] The Union's majority support had always been in doubt, because the Union won its certification election by just one vote, and a large contingent of the workforce did not vote in the election.

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the ILWU. The employees believed certain actions by the ILWU had a negative impact on the employees' livelihood, and therefore, they did not want to be represented by the ILWU. *Id.* The employees were upset because the ILWU instigated two boycotts of the hotel, and as a result, business at the Hotel declined dramatically.[5] *Id.* As a result of the boycotts, the employees were affected personally because they lost hours, wages and tips due to the decrease in business. *Id.* Therefore, the employees were upset or disgruntled with the ILWU's antics, and they decided they did not want to be represented by the ILWU. *Id.*

Naturally, as the employees became upset and disgruntled with the ILWU, they began to discuss the ILWU's actions amongst themselves. *Id.* It soon became very clear that the general consensus among the employees was they did not support the ILWU's antics, and in turn, did not support the ILWU. *Id.* In fact, some employees had gone straight to the ILWU and asked them to stop the boycotts, but their requests were quickly rejected. *Id.* This angered the employees even more. *Id.*

At some point, some employees decided to create and circulate a petition that denounced support of the ILWU. The petition stated: "We the employees of the Pacific Beach Hotel do not want to join the ILWU or any union." *See R-12.* This petition was circulated amongst the Hotel employees, and in just a few weeks time, 227 employees – or 62% of the workforce – signed the petition. *Id.* This petition was later presented to the Respondents. *Id.*

During the hearing, as one of the employees – Stuart Fishel – started to testify about the employees' anti-union sentiment at the hotel, the Judge made a *sua sponte* ruling that such

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[5] The first boycott was designed to convince local communities and organizations not to patronize the Hotel. This part of the boycott resulted in a loss of banquets, dining, and rooms reservations at the hotel. The second boycott involved the ILWU convincing a Japanese delegation to not patronize the Pacific Beach Hotel. The Hotel's business has always been largely dependent on its Japanese clientele, and the Japanese boycott caused a loss of business at the hotel.

testimony was "irrelevant" to the proceedings. *Tr. at 1856:23-24.* The Judge ruled that such evidence proposed by Respondents was "irrelevant" despite previously allowing very similar testimony about the ILWU's own petition from a witness presented by the General Counsel. *Tr. at 1856:23-24.*

In response, Respondents made an offer of proof regarding what the employees would testify about. *R-12.* Specifically, the employees were prepared to testify that all the Hotel employees were talking about the ILWU and the boycotts, and the majority of employees did not support the ILWU or its antics. *Id.* Based on such discussions, it was clear to the employees that the general consensus at the Hotel was the employees did not want to be represented by the ILWU. *Id.* It was also clear that the causes of the anti-union animus were the two boycotts instigated by the Union. One employee would have testified that the boycotts "really turned the tide" and caused employees to be against the Union. Another employee stated many employees who used to support the Union were now against the Union because of the boycotts. *Id.* As one employee put it succinctly: "the Union is supposed to help us, but they are just hurting us." *Id.*

Upon receiving Respondents' offer of proof, the Judge rejected such evidence as "hearsay." In response, Respondents argued that this exact same type of testimony was deemed admissible by the Board in *Levitz Furniture Co.*, 333 NLRB 717 (2001) and the United States Supreme Court in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). Specifically, in *Levitz*, the Board ruled that employees' "statements regarding other employees' union sentiments" were admissible in proceedings involving RM petitions. Therefore, the Board specifically ruled that statements such as "the entire night shift opposed the union" or "the employees do not want a union and that if a vote was taken, the union would lose" were admissible in an RM proceeding similar to the present case.

In addition, the Board's decision in *Levitz* was based upon a Supreme Court decision where the Court ruled an NLRB Administrative Law Judge erred by discounting an employee's opinion about the lack of union support amongst his co-workers. In its decision, the Court noted that "the most significant evidence excluded from consideration by the Board consisted of statements of two employees regarding not merely their own support of the union, but support among the work force in general." Clearly, the Supreme Court's decision supports the admission of employees' testimony about the union sentiments of the workforce in this proceeding.

Finally, it should also be noted the General Counsel's own legal memorandum, GC 02-01, dated October 22, 2001, specifically stated that "employee's unverified statements regarding other employees' antiunion sentiments and employees' statements expressing dissatisfaction with the union's performance as bargaining representative" are "now acceptable when evaluating an employer's uncertainty under the *Levitz* test."

Therefore, based on *Levitz, Allentown Mack* and the General Counsel's own legal memorandum, statements from Hotel employees that the majority of the workforce did not support the Union were clearly admissible and should have been made a part of the record in this case. Nevertheless, the Judge insisted that such evidence was not admissible.

During the hearing, the Judge also rejected any evidence regarding the disaffiliation petition by stating it would have been "tainted" because it was signed after Respondents had withdrawn recognition from the Union. *Tr. at 1840:15-19.* The Judge specified that the "presumption of taint is pretty strong at that point" under *Lee Lumber. Tr. at 1840:18-19.* In response, Respondents argued that the taint was merely "presumed," and that like all presumptions, it was rebuttable.

Respondents were then prepared to present testimony from the employees regarding their reasons for signing the petition. Specifically, while signing the petition, many of the employees stated they were upset or displeased with the ILWU because of the boycotts. They explained that when the ILWU's antics affected them personally and financially – and they lost hours, wages and tips due to the ILWU's antics – they decided they did not want to be represented by the ILWU. Therefore, they wanted to sign the petition to make it clear they did not want to be represented by the ILWU.

In addition, many of the employees actually sought out the employees who were circulating the petition and asked if they could sign the petition. They were prepared to testify that they were not tricked or coerced into signing the petition.

The Judge still rejected such evidence.

Respondents then argued that it had a right to rebut the presumption of taint, and that it could show "unusual circumstances" which led to employees signing the anti-union petition. Specifically, Respondents argued that under *Lee Lumber*, 322 NLRB 175, 177 (1996), the Board has stated:

> *In the absence of unusual circumstances*, we find that this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption.

Id. at 178. Under this language, where you have "unusual circumstances," the presumption of taint can be rebutted without resuming recognition and bargaining with a union. Rather, where "unusual circumstances" were the cause of the loss of majority, the presumption of taint is rebutted. In this case, Respondents argued that the "unusual circumstances" were the two

boycotts instigated by the ILWU and the employees' reaction to such boycotts. As the employees themselves were prepared to testify, it was the boycotts (and not the withdrawal of recognition) that made them sign the anti-union petition.

Therefore, testimony from the employees and evidence of their anti-union petition were clearly relevant to the proceedings – and, in fact, necessary to determine whether and why the ILWU lost the majority support of the employees. By refusing to accept such evidence into the record, and then ruling the Union had never lost majority support, the Judge effectively turned a deaf ear to Respondents' arguments and the sentiments of the employees.

Finally, at that point in time, any pending ULP's against Respondents were merely allegations; there had been no finding of a violation by Respondents. Therefore, it was erroneous for the Judge to rule that the petition was tainted, without (a) first finding a violation of the Act or (b) listening to evidence that could have rebutted the presumption of taint.

Therefore, in essence, the Judge has ordered Respondents (and the employees) to recognize the Union, despite knowing the Union has lost majority support of the employees. The Judge was able to reach this decision, however, because he simply ignored the fact that the majority of Hotel employees expressed their desire that they do not wish to be represented by the ILWU. This error by the Judge is significant because Respondents (and the employees) should not be forced to recognize the Union, if the Union is not supported by the employees. At the very least, the issue of the Union's lack of majority support should be based on a complete record, as opposed to the current record that is incomplete and one-sided.

2. The Judge Erred in Finding that Respondents Were Not Presented With an Uncoerced Disaffiliation Petition

In his Decision, the Judge specifically stated he denied Respondents' attempt to introduce evidence of the ILWU's loss of majority support because Respondents were not presented with

an "uncoerced disaffiliation petition." *Decision at 39:13.* This statement by the Judge is befuddling, because, as mentioned in the preceding section, that was *exactly* the type of evidence Respondents were seeking to admit into the record. As noted above, several employees were prepared to testify that the majority of Hotel employees had become disgruntled by the ILWU's antics (i.e. the boycotts) and therefore did not want to be represented by the ILWU. As a result, the employees signed a disaffiliation petition rejecting representation by the ILWU. Therefore, the Judge's reasoning for rejecting any evidence of the Union's loss of majority support is peculiar.

Perhaps, in reading the Decision, the Judge used the word "uncoerced" with a purpose. It is possible he found the petition to be "tainted" or "coerced" in some way, based on one of the unfair labor practices charged against Respondents. This finding, however, was flawed because it was based on an incomplete and one-sided record. Additionally, if the judge meant the petition was presumed to have "taint" because of pending unfair labor practices, Respondents had the right to rebut this presumption under *Lee Lumber*.

Similarly, if the Judge was implying that he presumed the petition was "coerced" in some way, Respondents have the right to rebut that presumption. Respondents, however, were never afforded that right or given the chance. Therefore, this decision by the Judge is particularly troubling, because Respondents specifically stated they had employees who were prepared to testify that they were neither tricked nor coerced into signing the anti-union petition. Rather, the employees would have testified that they were upset with the Union because of the boycotts, and therefore wanted to sign a petition stating they did not want to be represented by the ILWU. The employees felt that the ILWU's antics affected them personally and financially – and they lost

hours, wages and tips due to the ILWU's antics – they did not want to be represented by the ILWU.

Therefore, it was clearly erroneous for the Judge to conclude Respondents were not presented with an *uncoerced* disaffiliation petition, without first hearing the testimony from the employees about why they signed the petition. By so ruling, the Judge effectively created an incomplete and one-sided record to support his ultimate findings.

3. The Judge Erred in Finding the ILWU Has Represented a Majority of the Hotel Employees Since August 15, 2005

For similar reasons, the Judge's finding that the ILWU has had the majority support of employees since August 15, 2005 is also based on an incomplete and one-sided record. Specifically, the Judge rejected the testimony of several hotel employees who were prepared to present testimony and evidence that would have shown the Union has actually lost the majority support of the employees. The employees were prepared to testify that the majority of employees at the Hotel did not want to be represented by the Union, and this sentiment was confirmed by an anti-union petition signed by 62% of the employees. For some reason, however, the Judge excluded such testimony and evidence from the record.

This ruling by the Judge was particularly significant because he would not have been able to order Respondents to recognize or bargain with the ILWU if he found the ILWU had lost majority support of the employees. One of the only ways for the Judge to order Respondents to recognize the Union would be to discredit any evidence that the ILWU had lost majority support of the employees. In this case, the Judge took it one step further – he never let such evidence into the record. Such a decision was clearly erroneous.

B. The Judge's Findings That Respondents Committed Unfair Labor Practices Are Also Erroneous

All unfair labor practice charges in this case were contingent upon the General Counsel proving Respondents were in a joint-employer, agency, or successor employer relationship with an entity called PBH Management, LLC ("PBHM").[6] The Judge's decision, however, is void of any such findings. Without such a finding, all unfair labor practices, as alleged, must be dismissed.

Additionally, with regards to the merits of the alleged unfair labor practices, the Judge found that Respondents committed certain unfair labor practice violations. The Judge's findings, however, are contrary to the record and Board law. The Judge's erroneous findings are discussed in more detail below.

1. All Unfair Labor Practices Charges Should Be Dismissed Because the Judge Did Not Find Respondents to Be in a Joint-Employer, Agency, or Successor Employer Relationship With PBHM

As a bit of background, PBHM operated the Hotel from January 1 through November 30, 2007. During that time, PBHM – and not the Respondents – was the employer of the Hotel employees.

As the unfair labor practices in this case are alleged to have occurred in 2007, the General Counsel has pursued two theories of employer liability against Respondents. First, the General Counsel has argued that Respondents were a joint-employer with PBHM from January 1 – November 30, 2007. Under this theory of employer liability, the General Counsel has pursued certain unfair labor practice charges. Second, and in the alternative, the General Counsel has also argued that Respondents were a successor employer to PBHM, as of December 1, 2007, the

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[6] PBHM operated the Hotel from January 1, 2007 through November 30, 2007.

day Respondents took over operations of the Hotel. Under this theory of employer liability, the General Counsel has pursued a different, and smaller, set of unfair labor practice charges.

As noted at the very outset of Respondents' post-hearing brief, and as clearly delineated in the Complaint in this case, all allegations of unfair labor practices against Respondents in this case were contingent upon the General Counsel proving that Respondents should be liable for the alleged unfair labor practices under one of the two theories of employer liability. Accordingly, if the General Counsel is unable to prove Respondents were a joint-employer or successor employer with PBHM, the alleged unfair labor practice charges must be dismissed.

In this case, the Judge did not find Respondents were either a joint-employer or a successor employer with PBHM. Specifically, the Judge did not find Respondents to be a joint-employer with PBHM. Indeed, he could not have, because the record does not support such a finding. The Judge also did not find Respondents to be in an agency relationship with PBHM. Although he has stated Respondents' arrangement with PBHM was a "scheme" or a "sham," he never concluded Respondents' were in an agency relationship with PBHM. The Judge's Decision is absolutely void of any such finding. Finally, the Judge also did not find Respondents to be a successor employer to PBHM. In fact, in parts of his Decision, the Judge implied that Respondents could not be a successor to PBHM because the arrangement with PBHM was a "scheme." Nevertheless, there has been no finding that Respondents were a successor employer to PBHM.

Therefore, without finding the relationship between Respondents and PBHM was that of joint-employer or successor employer, the Judge could not find Respondents committed any of the alleged unfair labor practices. Indeed, all unfair labor practices alleged in this case were

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dependent on a finding that Respondents fell into one of the two theories of employer liability. Without such a finding, the unfair labor practices alleged in the Complaint must be dismissed.

2. The Judge's Finding that Respondents Bargained in Bad Faith Is Not Supported by the Record

Notwithstanding the Judge's failure to determine whether Respondents were a joint-employer or successor employer to PBHM, the Judge still found Respondents had not bargained in good faith with the Union. The Judge's finding is contrary to the record. Specifically, Respondents bargained with the Union for over one year; negotiations started in November 2005 and lasted until December 2006. *Tr. at 201.* During that time, Respondents and the Union met for approximately 36 negotiating sessions and reached tentative agreements on 170 different issues. *Tr. at 187, 201 and 316; see also GC-17.* The tentative agreements were reached throughout the entire course of negotiations and not all at once. *Tr. at 316.* When negotiations ended, only a few issues were left unresolved. *Tr. at 316.*

In finding Respondents did not bargain in good faith with the Union, the Judge appeared to have focused on several minor and isolated incidents. For example, the Judge noted that Respondents proposed a series of "ground rules" for the negotiations; at the same time, however, the Judge never stated such ground rules were unlawful. *Decision at 9:28-32.* In addition, the Judge glanced over the fact that the ILWU expressly agreed to these ground rules. *Decision at 9:32.* A close look at the ground rules reveals they were innocuous and served to facilitate the negotiating process – one ground rule was the parties would each have one spokesperson (Robert Minicola for the Respondents and Dave Mori for the ILWU); another ground rule was the parties would negotiate non-cost items first and cost items second. *Tr. at 203.*

In addition, the Judge pointed out that Respondents did not waiver on their positions on (a) union recognition, (b) dues deduction, and (c) arbitration. *Decision at 5-8.* What the Judge

failed to mention, however, was negotiations on those three issues were deferred at the suggestion of the Union. *Tr. at 325-26.* Specifically, Mori, the ILWU's spokesperson, suggested the parties defer negotiations on these three issues until they reached agreement on all other non-cost issues first. *Id.* Therefore, it was incongruous for the Judge to find Respondents bargained in bad faith, based on their position on these three provisions, when negotiations on these three provisions were deferred at the suggestion of the ILWU.

Additionally, the Judge also concluded Respondents were bargaining in bad faith because they insisted upon a broad management rights clause. *Decision at 6.* He stated that insisting on a broad management rights clause, along with their position on other issues, meant Respondent's bargaining was "all of a piece." *Decision at 8:41.*

Finally, the Judge pointed out Respondents were insistent upon having an open shop provision and rejected the Union's request for a union shop.[7] *Decision at 10:10.* What the Judge ignored, however, was the Respondents' position on the open shop provision was for good reason. As even Mori himself testified, Respondents' reason for an open shop provision was at least half of the Hotel employees did not want to be represented by the ILWU and did not want to pay dues to the ILWU. *Tr. at 327.* On the other hand, the Union rejected Respondents' proposal for an open shop simply because "out of the 200 contracts that the ILWU had negotiated with other employers, that [it] had no contract with an open shop." *Tr. at 219.* Therefore, it was erroneous for the Judge to find bad faith bargaining based upon an insistence of an open shop provision. At least Respondents had a valid reason for insisting on an open shop; the Union did not agree to an open shop simply because they had "never done it before." If anything, the Union was bargaining in bad faith.

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[7] The Union later suggested an agency shop provision.

Under Board law, the issue of whether a party has bargained in good faith or bad faith is measured under a "totality of conduct" standard. *See Matanuska Elec. Ass'n, Inc.*, 337 NLRB 680 (2002)("good faith or the lack of it depends upon a factual determination based on overall conduct."). Isolated instances of misconduct will not be viewed as a failure to bargain in good faith. *Id.*

In this case, the totality of circumstances indicates Respondents did *not* bargain in bad faith. First, Respondents met with the Union for 36 bargaining sessions over the course of one year. Second, during that time, Respondents reached tentative agreements on 170 different issues. Third, while Respondents *technically* did not waiver on their position on three provisions, it was only because the Union suggested the parties defer on those provisions until a later date.

In addition, the fact that Respondents did not waiver on their positions on certain provisions does not mean they were bargaining in bad faith. For example, under Board law, an employer's insistence on an open shop provision does not equate to bad faith bargaining. *See APT Medical Transportation*, 333 NLRB 760 (2001). Similarly, insistence on refusing to include a dues check-off provision in a contract is not conclusive evidence of bad faith bargaining. *See American Thread Co.*, 274 NLRB 1112 (1985)(ruling employer did not engage in bad faith bargaining by refusing to agree to dues check-off provision). Additionally, the Board has also ruled that an employer's refusal to agree to an arbitration provision does not constitute bad faith bargaining. *See APT Medical*, supra at 768 (finding that employer's refusal to agree to the use of a neutral arbitrator to resolve grievances was not, by itself, evidence of bad faith.). *See also Dish Network Service Corp.*, 347 NLRB No. 69 (2006)(Board ruled that employer's rejection of an arbitration provision was not unlawful.). Finally, the Board has ruled

that while insisting on a broad management rights clause may be "hard bargaining," it does not constitute bad faith bargaining. *See Coastal Electric Coop.*, 311 NLRB 126 (1993)(noting that "insistence on a broad management rights clause is not itself inherently unlawful or evidence of bad faith.").

Clearly, under the totality of circumstances, Respondents cannot be said to have bargained in bad faith. Rather, the negotiations proved to be rather fruitful, with 170 signed tentative agreements, and just a few issues left unresolved. In addition, many of the Judge's criticisms of Respondents' bargaining were unwarranted, because, at the most, they would be considered minor or isolated instances of misconduct. Any such isolated instances of possible misconduct are insufficient to negate Respondents' overall good faith bargaining. *Matanuska Elec.*, supra. Therefore, the Judge's conclusion that Respondents bargained in bad faith was erroneous.

3. The Judge Erred By Finding Respondents Utilized PBHM as a Middleman as Part of a Scheme to Deprive Employees of Union Representation

As noted, the Judge did not find Respondents to be a joint-employer or a successor employer to PBHM. Somehow, however, he did conclude Respondents used PBHM as a middleman as part of a "scheme" to thwart the Union. This finding by the Judge was not supported by the record. If anything, the record clearly indicates that Respondents and PBHM had a somewhat contentious relationship (which is why it ended) and under no circumstances did Respondents use PBHM as a "middleman" or as part of a "scheme."

a. Contrary to the Judge's Findings, Respondents Did Not Retain Control Over Operations and Negotiations When PBHM Was in Charge

The Judge's finding that Respondents retained control over the operations of the Hotel and negotiations for a collective bargaining agreement in 2007 is completely contradicted by the

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record. Specifically, the Judge based this conclusion on his erroneous finding that Respondents had the right "to select PBHM's general manager" and that Respondents maintained control over PBHM's ability to negotiate a collective bargaining agreement with the Union. First, Respondents did not select PBHM's general manager. Rather, Respondents simply maintained the right to approve who PBHM hired as the initial general manager for the hotel. Surely, as Respondents still owned the hotel, it had an interest in ensuring that PBHM hired someone who was qualified for the position. *Tr. at 1928.* Additionally, retention of the right to approve the general manager was a "very common" practice in the hotel industry. *Tr. at 1929.* In this case, Respondents approved the very first person PBHM selected for the position. *Tr. at 1931.* This can hardly be considered having "the right to select PBHM's general manager."

Second, Respondents did not maintain control over PBHM's ability to negotiate a collective bargaining agreement. Specifically, PBHM entered into several tentative agreements with the Union, and it is undisputed they did not discuss the contents of any of those tentative agreements with Respondents before signing such agreements. *Tr. at 538.* Likewise, Respondents did not ask to see or review any of the tentative agreements reached between PBHM and the Union before they were signed. *Tr. at 568.* Finally, the record is very clear that Respondents were not involved in the negotiations in any way during the time PBHM was running the Hotel. *Tr. at 242.*

The Judge's conclusion was also based on very innocuous findings that can hardly constitute Respondents maintaining control over the Hotel operations. For example, the Judge pointed out that Respondents required PBHM to hire all of its employees in the same or a substantially equivalent job position. This arrangement was simply intended for PBHM to assume the property as "status quo." *Tr. at 93.* PBHM projected it could and would operate the

Hotel at either the same or a higher occupancy level than Respondents. *Tr. at 1966.* Therefore, because the occupancy – or business – at the Hotel would either stay the same or increase, PBHM could keep all of the employees. *Tr. at 1967.* The hiring of all hotel employees was just based on PBHM's projections, however, and PBHM was free to subsequently make any adjustments to the staffing levels as they saw fit. *Tr. at 1967.*

Additionally, the Judge also noted that PBHM was required to hire Respondents' Food and Beverage Director. The Judge's reliance on this finding, however, is inconsequential to whether Respondents retained control over the Hotel operations. Specifically, PBHM did not have experience operating Food and Beverage outlets, and the Hotel had three different restaurants at the time. *Tr. at 95 & 1956.* Therefore, Respondents wanted to ensure that PBHM had an employee who knew how to operate the restaurants. *Tr. at 1956.* Moreover, the Food and Beverage Director can hardly be considered a position that would have an impact on whether Respondents maintained control over the Hotel, at least not in regards to labor relations. Rather, the Food and Beverage Director's task was to provide expertise and service on the food and beverage operations. *Tr. at 95.*

Clearly, the Judge's bases for finding Respondents maintained control over the operations of the Hotel and the contract negotiations in 2007 are erroneous. During that time, PBHM was the employer of record, and it had full authority to operate the Hotel and negotiate a collective bargaining agreement with the Union. Any finding otherwise is simply contradictory to the record in this case.

b. The Judge's Finding that Respondents Cancelled a Management Agreement With PBHM for Anti-Union Purposes is Contrary to the Record

Respondents cancelled the management agreement with PBHM for legitimate business reasons. Specifically, from the very outset, PBHM displayed its inability to perform up to

expectations. For example, throughout 2007, Respondents held monthly meetings with PBHM to review the hotel's monthly performance and financial situation. *Tr. at 1986.* During each meeting, PBHM presented Respondents with a Financial Summary report that detailed the monthly and year-to-date figures for income and expenses. *See R-15.* Initially, the monthly financial reports contained a breakdown of the market segment and other variance information, i.e. the revenue generated from visitors arriving from the mainland United States, from International travel, and from Japan. *See R-15.* Because the Hotel's business came primarily from Japan, the financial reports identified and separated the information about Japan from the rest of the international travelers. *Id.* In addition, the Hotel also funded the Japan office through a commission of 2.5% of revenues that came from the Japanese wholesale market. *Tr. at 2056.*

Based on its own financial reports, PBHM's performance in the first four months was abysmal. Specifically, for January 2007 alone, PBHM was behind its projected revenue by $163,452.00. *See Id.* After February 2007, PBHM was $654,047.00 behind its projected revenue. *Id.* After March 2007, PBHM was $252,328 behind its projected revenue, which indicated some signs of improvement. *Id.* After April 2007, however, PBHM was behind the projected revenue by $843,664.00. *Id.* After just four months of operations, it was evident PBHM could not meet its expectations or "rosy predictions." *Id.*

During the hearing, PBHM representatives admitted the revenue had been poor, but tried to explain itself by stating profits had increased. *Tr. at 391.* As Mr. Minicola explained, however, this "profit" was the result of PBHM's cost-cutting measures throughout the hotel. *Tr. at 2026.* According to Respondents, PBHM "leaned out the operations" and was "reducing expenses everywhere they could" in order to increase profitability, even though Mr. Minicola cautioned PBHM about the potential for serious repercussions if the equipment was not

maintained properly. *Tr. at 2026, 2033 & 2063.* Respondents were also aware of complaints by Far East clientele because of the cut backs. *Tr. at 1123.*

Yet, PBHM informed Respondents it would cut costs everywhere they could. *Tr. at 2033.* Respondents were concerned because they were still responsible for the condition of the Hotel even though another company was operating the Hotel. *Tr. at 2034.* One of Respondents' biggest concerns was the Oceanarium tank, which was the signature attraction of the Hotel. *Tr. at 2034.*

This cost-cutting measure proved to be disastrous when something went awry with the Oceanarium fish tank and approximately 80-100 fish ended up dying. *Tr. at 2040.* PBHM's reaction to the fish dying was something akin to "no big deal, we'll get you more fish." *Tr. at 2043-44.* PBHM seemed to take the situation rather lightly, even though the Hotel restaurants had customers watching as the fish were dying. *Tr. at 2044.* PBHM has also not explained what happened to the fish tank to cause the fish to die (Respondents have still not been informed as to what went wrong). *Tr. at 2044.* Prior to this incident, the Hotel had never had a similar incident in the past where numerous fish died. *Tr. at 2043.*

In addition, based on the financial reports, PBHM was not bringing enough guests to the Hotel and occupancy was getting worse. *Tr. at 2018.* Therefore, Respondents felt PBHM needed to make some improvements with the marketing of the Hotel. *Tr. at 2018.* This was troubling for Respondents, because at the time the projections were made, PBHM represented they were reasonable and attainable. *Tr. at 1076.* While operating the Hotel in 2007, however, PBHM admitted its own forecasts were not achievable. *Tr. at 1088.*

When Respondents pointed out the low occupancy numbers, PBHM's response was something akin to "we just took over, and [we] can't do anything for [Pacific Beach Hotel] for

this year, and more than likely, 2008 will be when [we] can really make a big difference." *Tr. at 2021.* The low occupancy affected not only revenue for the room reservations; it affected the revenue for restaurants and retail shops as well. *Tr. at 2018-19.* In other words, the reduced foot traffic caused by the lower occupancy meant the food and beverage outlets would get less business. *Tr. at 2003.* The decreased revenue of the retail outlets was a concern for Respondents because the Hotel's leases with the retail outlets included base rent *and* lease rent, meaning Respondents got a certain percentage of the gross revenue of their tenants. *Tr. at 2019.* Therefore, lower revenue for the retail outlets resulted in less money for Respondents. *Tr. at 2019.*

In addition, PBHM also stated that if Respondents wanted to see a "big difference" sooner, they need to pay PBHM more money. Specifically, PBHM wanted an additional fee for the domestic wholesale market, and Respondents balked because that was contrary to what the parties agreed to in the Management Agreement. *Tr. at 2022-23.* PBHM then explained that if it made any adjustments to its marketing plan in order to increase business at the Hotel, it would negatively impact business at other properties it managed, like the Waikiki Beachcomber and Ala Moana Hotel. *Tr. at 2022.* Therefore, PBHM stated it could not do anything for the Hotel that would negatively impact other hotels it was managing, unless Respondents paid PBHM more money. *Tr. at 2022.* PBHM also stated it wanted an extra fee for domestic wholesale above and beyond what was included in the Management Agreement. *Tr. at 2023.*

PBHM did not prepare a budget until April 2007, and the budget had a lot of discrepancies. *Tr. at 2030.* Mr. Minicola was not satisfied with the budget, but PBHM implemented the budget anyway. *Tr. at 2031.*

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In June 2007, Respondents and PBHM held a meeting to discuss the May financials and the status of PBHM's management of the Hotel. *Tr. at 2067.* During that meeting, PBHM first started by apologizing about the Oceanarium incident. *Tr. at 2067.* PBHM also had three major topics it wanted to discuss. First, PBHM wanted to charge Koa Management a 1.5% "chain fee" for domestic wholesale bookings. *Tr. at 2068.* Mr. Minicola stated the chain fee was not part of the Management Agreement. *Tr. at 2068.*

Second, PBHM wanted to close the Shogun restaurant, or at the very least, cancel some meal periods. *Tr. at 2068.* Respondents responded that was something that needed to be discussed with their landlord, because the restaurants' leases were tied into the ground lease. *Tr. at 2069.*

Third, PBHM stated it did not want to pay a 2.5% commission that was being paid to the Japan office. *Tr. at 2069.* PBHM wanted to close the Japan office, and Respondents responded that most of the Hotel's revenue came from Japan and they could not close the Japan office. *Tr. at 2069-70.* Respondents also made it clear that any attempts to close the Japan office would be a "deal breaker." *Tr. at 2070.* PBHM insisted it was going to stop paying the 2.5% commission to the Japan office. *Tr. at 389; see also General Counsel Exhibit 41.*

On July 2, 2007, Respondents and PBHM met to discuss the financials for May 2007. *Tr. at 2075.* According to Respondents, the July meeting was "the worst meeting that [they] had." *Tr. at 2076.* First, discussions between the parties were already "heated" from the prior meeting. *Tr. at 2076.* Second, PBHM tried to introduce new budget numbers and new target numbers that would have completely disregarded its poor performance and $843,664.00 deficit from the first four months of 2007. *Tr. at 2076-77.*

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In producing the new budget and target numbers, PBHM stated it wanted to "start from scratch" and forget about the first four months of business. *Tr. at 2079.* In other words, PBHM wanted to wipe out the large deficit it had built up through May 2007. *Tr. at 2080.*

On July 3, 2007, Mr. Minicola traveled to Japan to meet with John Hayashi and discuss PBHM's plans to close the Japan office. *Tr. at 2082.* After speaking with Mr. Hayashi, Mr. Minicola confirmed he would be forced to terminate the Management Agreement with PBHM if PBHM tried to close the Japan office. *Tr. at 2083.*

On July 16, 2007, PBHM sent Respondents a letter stating it would start charging Respondents a 1.5% "chain fee" and would also be canceling the 2.5% commission it was paying to the Japan office. *Tr. at 2074; see also GC-41.* The letter specifically stated PBHM would implement both matters "immediately." *Id.*

Upon receiving the letter from PBHM, Mr. Minicola spoke with Barry Wallace, Outriggers Vice President of Hospitality Services, over the telephone. *Tr. at 2085-86.* Mr. Wallace's duties with Outrigger included handling the operations and revenue for Pacific Beach Hotel through PBHM. *Tr. at 376.*

Mr. Minicola informed Mr. Wallace that Koa Management would terminate the Management Agreement if PBHM was "serious" about the contents of its letter. *Tr. at 2086.* Mr. Wallace said he would get back to Mr. Minicola, but he never did. *Tr. at 2086.*

On August 1, 2007, Respondents met with PBHM representatives to discuss the financial reports for June 2007. *Tr. at 2087; see also R-15.* For June 2007 alone, PBHM had a budget deficit of $289,000.00. *Tr. at 2087; R-15.* During this meeting, PBHM also provided Respondents with a Stellex-based report, which did not identify and separate the amount of business coming from Japan. *Tr. at 2088-89.* From viewing the report, Respondents would have

been unable to calculate the 2.5% commission that should be paid to the Japan office. *Tr. at 2089.* Mr. Minicola expressed his "*great displeasure*" with PBHM and its antics. *Tr. at 2090.*

At the August 1, 2007 meeting, based on his recent dealings with PBHM, Respondents informed Mr. Comstock that Koa Management was going to terminate the Management Agreement and that a termination letter was being drafted at that time. *Tr. at 2087.* Respondents explained the reason for the termination was a combination of many factors – the Japan office incident, the Oceanarium tank debacle, and being "jerked around" with the financials and budget. *Tr. at 2088.*

The very next day, on August 2, 2007, PBHM sent Respondents a letter asking for consent to (a) provide portions of the Management Agreement to the ILWU, and (b) propose a two-year collective bargaining agreement to the ILWU. *See GC-45.* At that time, Respondents were already preparing a letter to terminate the Management Agreement with PBHM and having the letter reviewed by their attorneys. *Tr. at 2116.* According to Mr. Minicola, the termination was based on the arrogance of PBHM, the poor performance of the property, and the decision to stop paying the 2.5% commission to the Japan office. *Tr. at 2118.* The termination was not related to PBHM's letter dated August 2, 2007 in any way. *Tr. at 2119-20.*

During the hearing, PBHM representatives testified they were not surprised by the termination letter. *Tr. at 452.*

In his Decision, the Judge stated Respondents' explanation that they cancelled the management agreement because PBHM did not hit its budget projections was "unimpressive." *Decision at 40.* He reasoned that "preliminary budgets projections were known to be flawed." He then stated "everyone understood, or should have understood, that the previous numbers were estimates and targets[.]" *Id.* For this reason, the Judge rejected Respondents' reason for

terminating the Management Agreement with PBHM. What the Judge does not mention, however, is Respondents selected PBHM to operate the hotel *because* of the "rosy" projections. Based on such rosy projections, Respondents selected PBHM over two other companies that wanted to operate the Hotel. Therefore, Respondents had good reason to hold PBHM accountable for its projections, because it was hired based on the projections. Otherwise, there would be no need for such projections in the first place.

In addition, the Judge also completely ignores the fact that PBHM threatened to stop paying the commission for the Japan office, a move Respondents made clear would be a deal-breaker. In reviewing the record, it is clear Respondents needed to end the Management Agreement; otherwise, PBHM had threatened to stop paying the commissions for the Japan office "immediately."

Therefore, Respondents clearly had a legitimate reason for terminating the Management Agreement. Contrary to the Judge's findings, the Union played no role in Respondents' decision to cancel the Management Agreement. Rather, Respondents cancelled the Management Agreement because PBHM failed to meet its projected budget; finagled the budget to hide its shortcomings; and threatened to halt the operations of the Japan office, despite knowing such action would be a deal breaker.

c. The Judge's Finding that Respondents Were Obligated to Bargain With the Union While PBHM Was the Employer at the Hotel Was Erroneous

Based on the foregoing, Respondents were clearly not the employer of the Hotel employees from January 1 through November 30, 2007 and clearly did not have control over the operations of the Hotel. Therefore, the Judge's finding Respondents were obligated to bargain with the Union during that time is erroneous.

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4. The Judge Erred in Finding Respondents Unlawfully Withdrew Recognition From the Union on December 1, 2007

When Respondents replaced PBHM as the operators of the Hotel on December 1, 2007, the Union no longer had the majority support of employees. Therefore, Respondents withdrew recognition from the Union.

Respondents based their withdrawal on several factors – including the lack of employee participation at rallies; the Union's inability to demonstrate majority support; employees going up to Mr. Minicola and constantly telling him they did not want to be a part of the Union; a general consensus amongst the workforce that they did not want to be represented by the Union; and the fact that from the very beginning, the Hotel always had a large contingency of employees that did not want to be represented by the Union. *Tr. at 124-25 & 134.*

Mr. Minicola had countless conversations with many of the Hotel employees, who informed Mr. Minicola they did not want to be represented by the Union. In addition, the employees informed Mr. Minicola that the majority of Hotel employees did not want to be represented by the Union. From speaking with the employees, it was clear the Union had actually lost majority support of the employees.

Therefore, while Respondents as a successor employer may have had a duty to recognize the Union, the Union was entitled to only a rebuttable presumption of majority status. *See MV Transportation*, 337 NLRB 770 (2002). This presumption could be rebutted through a valid decertification, a rival union, employee petition, or other valid challenge to the Union's majority status. *Id.* Additionally, as a successor employer, Respondents could challenge the Union's majority status "at any time." *See Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

In this case, the Union's presumption of majority status was rebutted by the employees' overt rejection of the Union, the lack of employee support in union activities, the fact that half of the employees never wanted to be represented by the Union from the very start; and the overt and general consensus of employees that they did not want to be represented by the Union. Therefore, Respondent's withdrawal from the Union was lawful.

5. The Judge Erred in Finding Respondents Had a Duty to Provide Information to the Union While PBHM Was the Employer

The Judge also erred in ruling Respondents violated the Act by not responding to requests for information from the Union in April, August and September 2007. As noted above, Respondents were not the employer of the Hotel employees during that time and were not involved in the negotiations.

As the Supreme Court has noted, *employers* have a duty to provide relevant information to union representative *during contract negotiations. See NLRB v. Truitt Mfrg. Co.*, 351 U.S. 149 (1956). In the present case, Respondents were not the *employer* of the Hotel employees when the requests for information were made by the Union. In addition, Respondents were also not involved in the contract negotiations. The negotiations were solely the responsibility of PBHM. Therefore, Respondents did not have a duty to respond to the Union's requests for information. In addition, Respondents also had no control over the actions of PBHM and were not a joint-employer with PBHM. Therefore, Respondents cannot be held liable for PBHM's failure to respond to the information requests.

In addition, in order for the obligation to furnish information to attach, there must be a request made and the information requested must be relevant to the union's collective bargaining need. *See Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). In his Decision, the Judge ordered Respondents to provide information to the Union regarding the legal relationship

between Respondents and PBHM. Such information, however, is no longer relevant to any negotiations that would occur in the future because PBHM is no longer the employer for the Hotel employees. Therefore, even assuming the Judge could somehow find that Respondents should have provided such information to the Union in 2007, the issue is now moot. For this reason, Respondents request this portion of the Judge's Decision be stricken.

6. The Judge Erred in Finding that Unilateral Changes Made by Respondents Were Unlawful

Similarly, the Judge did not find Respondents were a successor employer when they resumed operations on December 1, 2007. As noted above, while the Judge did not find Respondents to be a joint-employer with PBHM, he also did not issue a ruling on whether he found Respondents to be a successor employer with PBHM. Therefore, that issue appears to be unresolved. If this Board concludes Respondents were not successors to PBHM, all unfair labor practice charges pursued against Respondents under the General Counsel's successor employer theory of liability should be dismissed.

On the other hand, if this Board concludes Respondents were indeed successors to PBHM, it must also conclude that all changes Respondents made to the terms and conditions of employment for the Hotel employees were lawful. First, the General Counsel did not allege that Respondents unlawfully changed the terms and conditions of employment for Hotel employees under its successor employer theory of liability. Therefore, as the Complaint is written, there is no allegation that Respondents unilaterally changed the employees' terms and conditions of employment as a successor employer.

Second – and perhaps this is the reason the General Counsel did not allege Respondents unlawfully changed terms and conditions of employment under its successor theory of liability – Respondents had a right to set the employees' initial terms and conditions of employment as a

successor employer. *See NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The General Counsel even acknowledges so in its post-hearing brief. *See GC Brief at 183.* Therefore, if this Board finds Respondents were a successor employer to PBHM, the unfair labor practice charges alleging Respondents unlawfully changed the Hotel employees' terms and conditions of employment should be dismissed.

7. The Judge Erred in Ruling that Respondents Discharged Seven Employees Because of Union Animus

Respondents had legitimate and non-discriminatory reasons for not rehiring certain employees at the Hotel on December 1, 2007.[8] The Judge, however, found Respondents' reasons for not hiring seven different individuals insufficient or "unpersuasive." *Decision at 38:8.* By reaching this conclusion, the Judge focused on innocuous or circumstantial instances of Union conduct he believed negated Respondents' valid reasons for not hiring certain employees. Such reasoning, however, was erroneous under Board law. *See Merillat Indus.*, 307 NLRB 1301, 1303 (1992)("[T]he defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.").

In addition, it was also improper for the Judge to determine whether Respondents' nondiscriminatory reasons for not selecting certain employees were insufficient or unpersuasive. *See 6 West Limited Corp.*, 330 NLRB 527, n.5 (2000)(the Board does not determine whether a "nondiscriminatory reason for [employment action] is wise or well supported."). Finally, it was erroneous for the Judge to substitute his own business judgment for that of Respondents or act as a "super-personnel" department. *Id.*

In this case, Respondents' reasons for not hiring certain employees were legitimate, non-discriminatory, and necessitated by the state of the economy. Specifically, when Respondents

[8] Respondents' reasons for not hiring certain employees are discussed in more detail below.

took over operations of the Hotel on December 1, 2007, the economy for the hotel industry was on a severe decline. In addition, the Hawaii tourism industry was also suffering, and it was clear the business at the Hotel would continue to decline. *Tr. at 1519 & 2141.* In previous years, the Hotel operated at approximately 88% occupancy, and was staffed accordingly. *Tr. at 1867.* For 2008, however, the Hotel was projected to operate at approximately 68%, a 20% decrease in occupancy.[9] Logically, because the Hotel's business is based upon occupancy, when the occupancy drops, the Hotel's staffing requirements also drop. *Tr. at 138.* Therefore, when Respondents took over operations of the Hotel in December 2007, staffing at the Hotel needed to be reduced. Tr. at 138. This included reduction of both managerial employees and bargaining unit employees. *Tr. at 121 and 1120.*

First, for managerial employees, 8 out of 62 could not be rehired. *Tr. at 121.*

Second, for bargaining unit employees, positions needed to be cut as well. Respondents needed to determine the staffing levels for each department. *Tr. at 1120.* The staffing levels were based on projected occupancy, as well as the Hotel's budget in terms of revenue and expenses. *Tr. at 2132.* Respondents then developed a six-factor test to help determine which employees should be rehired. *Tr. at 1123.* The six factors were: attitude, job performance, flexibility in scheduling, attendance, customer service and team work. *Tr. at 1123.* Flexibility was important because the hotel was going to run a leaner operation, and therefore, Respondents needed to hire employees who were dependable and could work different shifts. *Tr. at 1123.* Customer service was also important because of recent negative comments from the Far East clientele, and therefore, service needed to be improved. *Tr. at 1123.* Attendance was important because Respondents needed people who were dependable and would not miss work. *Tr. at*

[9] The actual occupancy numbers were lower than expected – at 65%.

1244. Being a team player meant being an employee who got along with others, followed directions, and was flexible in helping others. *Tr. at 1373.* Having a good attitude referred to somebody who had a positive frame of mind. *Tr. at 1373.* This sometimes overlapped with customer service. *Tr. at 1373-74.*

The six-factors were weighed differently for different types of employees. *Tr. at 1124.* For example, some factors were more important for front-of-the-house employees who had a lot of guest interaction, than for back-of-the-house employees who had little guest interaction and customer service was not as critical. *Tr. at 1124 & 1243.*

In *Jerry Ryce Builders, Inc.*, 352 NLRB No. 143 (2008), the NLRB provided that in order to establish a charge of a discriminatory refusal to hire, the General Counsel has the burden of proving the following three elements:

(1) The employer was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct;

(2) Applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and

(3) Antiunion animus contributed to the decision not to hire the applicants.

If the General Counsel is successful in meeting this burden, the employer must show it would not have hired or considered the applicants even in the absence of their union activity or affiliation. *Id.* If the employer asserts the applicants were not qualified for the positions it was filling, the employer has the burden of proving they did not possess the specific qualifications for the position required or that others who were hired had superior qualifications, and that the employer would not have hired them for that reason even in the absence of their union support or activity. *Id.*

In the present case, the General Counsel's arguments – and the Judge's findings – that Respondents discriminated against union supporters were based entirely upon circumstantial evidence. The General Counsel did not provide any direct evidence Respondents' hiring decisions were ever based on an employee's union sentiment, nor did the Judge find any. In addition, there was no evidence Respondents targeted specific individuals or singled out any employees because of their union sentiment. Rather, the Judge's finding that Respondents acted in a discriminatory manner rested solely upon circumstantial evidence, and primarily on the fact that a few of the 40+ employees that were not hired were members of the ILWU's bargaining committee.

At the same time, the General Counsel ignored the fact that the majority of the ILWU's bargaining committee members were in fact hired. Specifically, Bing Obra, Guillerma Ulep, Larry Tsuchiyama, Edison Yago, Cesar Pedrina and Enoch Chong were all rehired as of December 1, 2007. In addition, Keith Kanaiaupuni and Todd Hatanaka were also rehired in early 2008. Two of the ILWU bargaining committee members, Carol Ped and Desiree Hee, did not apply for their jobs. Therefore, out of the 13 bargaining committee members who applied for their jobs, eight were hired.

The five employees who were not hired were either not qualified for their jobs or there was somebody in their department who was more qualified for their jobs. For example, Mr. Villanueva was clearly a sub-par employee. He was prone to taking shortcuts at work to make his job easier for himself and would commit safety violations in the process. He also did not follow proper protocol on more than one occasion in just an eight-month span, which led to guest complaints. Finally, Mr. Villanueva had perhaps one of the worst attendance records in the entire housekeeping department. Therefore, Ms. Ko felt that on top of not being qualified for his

job, Mr. Villanueva was also not reliable or dependable. Therefore, Ms. Ko recommended he not be rehired.

Ms. Recaido also was not qualified to be rehired because she was an insubordinate employee who also was not a good team player. Specifically, Ms. Recaido would speak up against supervisors in the Housekeeping Department in an insubordinate manner and not show any respect for authority. In addition, Ms. Recaido tried to embarrass her co-workers or get her co-workers in trouble by insisting that Ms. Ko tell everybody when an employee made a mistake at work. Ms. Ko thought these were signs of a bad employee, and therefore, recommended Ms. Recaido not be rehired.

Similarly, Mr. Miyashiro was not hired for good reasons as well. As Mr. Lopianetzky explained, Mr. Miyashiro once started a fire in the kitchen which could have led to very serious damage. Mr. Miyashiro received a one-day suspension for the incident, per Mr. Minicola, although Mr. Lopianetzky thought the punishment should have been more severe. In addition, as was evident during the hearing, Mr. Miyashiro still has not accepted responsibility for starting the fire. Specifically, even during the hearing, Mr. Miyashiro testified as though he did nothing wrong, that he blew out the sterno which caused the fire and touched the sterno to make sure it was not hot. This testimony was indicative of Mr. Miyashiro's attitude towards the incident – mainly, he still was not accepting responsibility for the incident. In addition, this testimony was not credible because if Mr. Miyashiro blew out the sterno right before he touched the sterno, it would obviously still be hot. Yet, he tried to testify he blew out the sterno and touched it right after and it was not hot. This testimony was simply not credible.

Mr. Lopianetzky also testified Mr. Miyashiro was continuously harassing one of his co-workers to the point where he made the co-worker cry. Mr. Miyashiro harassed his co-worker so

much the co-worker went crying to Mr. Lopianetzky, asked him to remove her from the banquets she was working, and not mention anything to Mr. Miyashiro. This behavior by Mr. Miyashiro was unacceptable in Mr. Lopianetzky's mind, and therefore, Mr. Lopianetzky recommended he not be rehired.

Finally, although the Judge has essentially concluded Mr. Miyashiro should have been hired over other banquet department employees, the Judge did not provide any evidence to show Mr. Miyashiro was more qualified to be hired than any other banquet employees. Rather, the converse is true – the evidence showed Mr. Miyashiro was not qualified to be rehired because he started a fire in a trash can at work, but did not really take responsibility for the incident, and also was caught harassing a co-worker to the point where he made the co-worker cry and stop working at certain VIP functions. Therefore, under the circumstances, Respondents' decision not to hire Mr. Miyashiro was perfectly reasonable.

Likewise, Mr. Bumanglag also was not qualified to be rehired. First, the two other employees who held the Maintenance I position were more qualified and more flexible in the scheduling than Mr. Bumanglag. Specifically, Mr. Lee was a certified air-conditioning specialist and Mr. Ballateria was able to work at night, whereas Mr. Bumanglag could only work during the day. Second, Mr. Lopianetzky was frustrated with Mr. Bumanglag because he was unable to properly fix equipment at the Hotel. In fact, in one incident, a banquet sous chef was electrocuted after Mr. Bumanglag said the machinery was ready to be used. Mr. Lopianetzky made several complaints to Mr. Emerick, Mr. Bumanglag's supervisor, but Mr. Bumanglag's work continued to be unsatisfactory. Therefore, when it was time to rehire employees and only two positions were available for the Maintenance I position, Mr. Lopianetzky hired Mr. Lee and Mr. Ballateria over Mr. Bumanglag.

Finally, Ms. Revamonte was not able to work and her name was not listed on the work schedule. Therefore, she was not hired. The fact that a Housekeeping employee, Ms. Sabado, who was also on workers' compensation leave but was on the work schedule, was hired was not relevant. First, the decision to hire Ms. Sabado was made by Ms. Ko, whereas the decision to not hire Ms. Revamonte was made by Mr. Lopianetzky. In addition, Ms. Ko was not instructed to not hire any employees who were on leave. Rather, she was simply told to pick six housekeeping employees who would not be rehired, and she used her best judgment to make such a decision. Therefore, while Ms. Ko and Mr. Lopianetzky may have used slightly different criteria in their decision making, both their reasoning was still legitimate and nondiscriminatory.

Clearly, Respondents' decisions for not hiring certain employees were based on legitimate and nondiscriminatory reasons. The Judge, however, has ruled such reasons were not satisfactory. By such reasoning, the Judge has effectively substituted his own judgment for that of Respondents. Such a decision was highly improper under Board law. *See Pro-Tec Fire Services, Ltd.*, 351 NLRB 52 (2007)(noting that the Board may not substitute its own business judgment for that of Respondent in hiring decisions).

8. The Judge's Finding that Respondents "Polled/Interrogated" Employees Was Erroneous

The Judge went to great lengths to explain why Respondents did not satisfy the *Struksnes* safeguards for conducting employee polls. *See Decision at 29.* Specifically, under *Struksnes*, the Board requires an employer to inform employees that the purpose of the poll is to determine the truth of a union's claim of majority and that no reprisals will be made for providing the information. In addition, the poll must be done by secret ballot and the employer cannot commit any unfair labor practices that would create a coercive atmosphere. *See Struksnes Construction Co.*, 165 NLRB 1062 (1967).

In this case, Respondents are alleged to have "polled" employees when they asked employees how they felt about a *boycott* occurring at the Hotel. The Judge ruled that such questions were illegal because they did not satisfy the *Struksnes* polling safeguards. The Judge's ruling was erroneous, however, because no "poll" regarding employees' Union sentiment was conducted in the first place. By asking employees how they felt about a *boycott*, Respondents were not trying to determine whether the majority of employees supported the Union.

Rather, they were simply asking employees about the boycott, because the boycott was hurting business at the hotel. In addition, Respondents knew several employees were upset about the boycott, and they were simply giving the employees an opportunity to voice their concerns. Not all polling is unlawful, and simply asking employees how they felt about the boycott does not constitute an unfair labor practice. *See Blue Flash Express*, 109 NLRB 591 (1954)(polling is unlawful only when it was coercive in light of the surrounding circumstances.).

During the hearing, even the General Counsel's own witnesses testified that while they were asked about the boycott, their Union sentiments were never questioned. For example, Guillerma Ulep testified that the housekeeping employees were told if they didn't agree with the boycott, they can speak with somebody in Human Resources. *Tr. at 957.* Likewise, Jacqueline Taylor-Lee also testified that Oceanarium employees were told if they didn't agree with the boycott, they could talk to somebody in the Human Resources department. *Tr. at 968.*

Clearly, Respondents did not conduct any poll about the employees' Union sentiments, and the Judge's application of *Struksnes* in this situation was misplaced. Accordingly, the unfair labor practice alleging Respondents conducted an illegal polling of employees should be dismissed.

9. **The Judge Erred by Finding Respondents Threatened Employees With Job Loss Because Such an Allegation Was Not Part of the Complaint**

In this case, the Complaint does not contain any allegations that Respondents threatened employees with job loss. *See GC-1vvvv.* Additionally, the General Counsel has not pursued such an unfair labor practice charge against Respondents in this case. Indeed, the General Counsel's post-hearing brief does not mention or argue that Respondents made any such threats against the Hotel employees. Therefore, there was clearly no pending unfair labor practice charge against Respondents regarding any threats of job loss.

Yet, somehow and for some reason, the Judge still found Respondents committed an unfair labor practice by telling employees they may lose their jobs if the Hotel had to close due to boycotts instigated by the Union. *See Decision at 46:40-44.* As there was clearly no such pending unfair labor practice charge against Respondents, however, the Judge's finding Respondents committed such an unfair labor practice charge is clearly erroneous. Accordingly, Respondents request the Judge's finding on this issue be reversed. Otherwise, if the Judge's finding is not reversed, it would constitute a clear violation of Respondents' due process rights.

C. **The Remedies Ordered By The Judge Were Not Warranted**

The Judge ordered a series of remedies that were not warranted under the circumstances. First, the Judge's order for Respondents to recognize and bargain with the Union was not appropriate because the majority of hotel employees clearly do not want to be represented by the Union. Therefore, Respondents (and the employees) should not be required to recognize the Union as the exclusive bargaining representative of the Hotel employees. Clearly, the reason the record may not contain sufficient evidence of the Union's loss of majority is because the Judge prevented any such evidence from being introduced into the record.

Second, the extension of certification was also not warranted, because it was (a) inappropriate under the circumstances of this case and (b) violative of the Section 7 rights of a majority of Hotel employees. Third and fourth, the extraordinary remedies and broad cease-and-desist order were inappropriate for the reasons discussed below.

1. The Judge Erred in Ordering Respondents to Recognize and Bargain with the Union

The most obvious and blatant error made by the Judge was to order Respondents to recognize and bargain with the Union. As noted above, the Union is not supported by the majority of Hotel employees, and the employees have expressly stated they do not want to be represented by the Union through the signing of a disaffiliation petition. Therefore, the Judge erred by ordering Respondents to recognize the Union as the exclusive bargaining representative of the employees. At the same time, the Judge also violated the Section 7 rights of the Hotel employees by forcing them to accept representation by a Union they do not support.

In this case, the Judge was "able" to order Respondents to recognize and bargain with the Union by first excluding from the record any evidence regarding the Union's loss of majority status. Specifically, the Judge prevented any and all employees (who wanted to testify they did not want to be represented by the Union) from testifying. This decision was clearly erroneous. Surely, the issue of whether the Union is supported by the majority of employees and should therefore be recognized as the employees' bargaining representative can only be addressed by first hearing from the employees on whether they want to be represented by the Union.

Therefore, in this case, the orders to recognize and bargain with the Union are, for lack of a better term, "tainted." They are based on an incomplete and one-sided record – one where the General Counsel and Union were able to present testimony the Union may have enjoyed majority support at one time, but the Respondents were not able to present their own testimony to the

contrary. To make matters worse, this isn't a case where testimony from employees was admitted into the record and then disregarded; the employees were denied the opportunity to testify in the first place.

The only way to rectify this situation would be to remand this matter and reopen the record for further testimony and evidence. Specifically, the Hotel employees should be able to testify and tell to the Judge whether or not they want to be supported by the Union. In addition, if the Judge were to presume the disaffiliation petition had "taint," he was first required to hear testimony from the employees on the *reason* they signed the petition. *See Pittsburgh and New England Trucking, Co. v. NLRB*, 643 F.2d 175 (4th 1981)(witnesses' testimony that unfair labor practices did not affect their union sentiment was relevant) and *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974)(in determining whether union had majority status, employer was entitled to introduce number of employee signatures on decertification petition.). Only through having a complete record can the Judge make an informed decision on whether the Union is supported by the majority of employees, and therefore, whether Respondents (and the employees) should still recognize the Union.[10]

2. The Judge Erred by Extending the Certification Period for One Full Year

Despite the fact Respondents have already bargained with the Union for over one year, met with the Union on 36 occasions, reached tentative agreements on 170 different issues, and have only a few remaining issues on which there was no agreement, the Judge ordered Respondents to bargain with the Union for another full year. *See Decision at 47:41-45.* In issuing this order, the Judge states he felt Respondents had never bargained in good faith with the Union. The Judge's reasoning and logic are simply flawed.

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[10] Respondents have filed an accompanying Motion to Remand and Re-Open the Record in this proceeding for the purposes of entering additional evidence into the record.

In determining the length of extensions of certification, the Board considers the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations. *See American Medical Response*, 346 NLRB 1004 (2006). Under these factors, a 12-month extension is clearly not warranted. First, Respondents have already met with the Union for 36 bargaining sessions and have reached agreement on 170 different issues. At this point, as the Judge himself has acknowledged, there are only a few outstanding issues left. Second, while Respondents engaged in hard bargaining on some of the issues, the Union itself has also engaged in hard bargaining. For example, one of the outstanding issues is that of open shop versus union shop. Respondents have insisted on an open shop because the majority of employees do not want to be represented by the Union. The Union, however, has insisted on a union shop (and then offered an agency shop), but for no reason other than to say they have not agreed to an open shop in the past. Clearly, the Union has played a role in the stalemate in negotiations. In addition, several of the open issues were not addressed because the Union suggested the parties defer negotiations on those issues. Therefore, Respondents cannot be blamed for those issues being unresolved.

Finally, the Board must consider the impact a one year extension of the certification period will have on the Section 7 rights of the Hotel employees. As noted throughout this brief, the majority of employees clearly expressed they do not want to be represented by the Union – by signing a disaffiliation petition. Although the petition itself has not been admitted into the record, there does not appear to be a dispute as to whether the petition exists. Indeed, one of the purposes of Respondents' exceptions is to allow testimony and evidence of the petition to be admitted into the record.

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Nevertheless, given the likelihood the employees will want to exercise their Section 7 rights to reject the Union in the future, this Board should take great care in extending the certification year for too long. *See American Medical*, supra, at 1005. Specifically, in *American Medical*, the Board stated:

> Extension of the certification year essentially forecloses, for that extended period, the employees' exercise of their Section 7 right to reject the Union or to choose another union. Because it has such a restrictive effect on the employees' central rights under the Act, the Board must act with care and precision when asked to extend the certification year.

Id. at 1005. Thus, in *American Medical*, the Board rejected the Judge's decision to extend certification for one year, and reduced the certification period to 3 months instead.

The General Counsel may argue that a shorter certification period will encourage Respondents to engage in surface bargaining and wait for the shorter certification period to expire, so the employees may file a decertification period. Therefore, the General Counsel may argue a longer certification period is necessary. Such an argument, however, would be flawed. First, as the Board noted in *American Medical*, in order to decertify the Union, the employees would need to submit a new petition and a whole new set of signatures in order to decertify the Union. Therefore, any petition that has already been signed by the employees cannot be used to decertify the Union in the future. *Id. at 1006.* Second, the Board cannot presume Respondents will bargain in bad faith. Rather, the Board "will presume innocence as to future actions, not guilt." *Id. at 1006.*

Therefore, in this case, a shorter extension period is more appropriate than the maximum 12-month extension. If this Board follows the decision in *American Medical*, a 3-month extension would be appropriate. In the alternative, at the very most, a 6-month extension may be appropriate under *Dominguez Valley Hospital*, 287 NLRB 149 (1987). In *Dominguez Valley*

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Hosp., the Board rejected the Judge's decision to extend certification for one full year, and ordered a 6-month extension instead. In that case, the Board ruled that a 6-month extension was appropriate in light of respondent's premature withdrawal from the union. In addition, the Board also considered the impact the extension would have on the employees. Specifically, the Board noted "such a 6-month extension will provide the parties with a reasonable interval in which to resume negotiations and, possibly, reach an agreement, without saddling employees with a bargaining representative they may no longer support." *Id. at 151.*

3. The Judge Erred in Issuing Extraordinary Remedies in This Case

The Judge issued a series of extraordinary remedies in this case, but such extraordinary remedies were clearly not warranted or necessary. As the Board has noted, extraordinary remedies are reserved for situations where a respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary to "dissipate fully the coercive effect of the unfair labor practices found." *See Federated Logistics & Operations*, 340 NLRB 255 (2003), quoting *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). Therefore, decisions to order extraordinary remedies have been carefully scrutinized by the Federal courts of appeals. *See e.g. NLRB v. Villa Avila*, 673 F.2d 281 (9th Cir. 1982).

Under this standard, extraordinary remedies were clearly not warranted against Respondents. First, as discussed throughout this brief, Respondents did not commit the alleged unfair labor practices. For example, Respondents did not bargain in bad faith and did not bargain with the intention not to reach an agreement. To the contrary, Respondents engaged in fruitful negotiations with the Union which led to agreement on 170 different issues and disagreement on just a few. Second, the Judge's reliance on repeated statements by Mr. Minicola that the Union won by only one vote cannot be attributed to having union animus. Clearly, Mr. Minicola made such statements in negotiations, where the issues of open shop versus union shop and dues

deductions were being discussed. Third, even if, assuming *arguendo*, Respondents did commit the alleged unfair labor practices, such conduct would not warrant an imposition of extraordinary remedies. The General Counsel has not established traditional remedies are insufficient to address the alleged unfair labor practices, and therefore, the Judge could not have found Respondent's conduct warranted extraordinary remedies under the circumstances.

In addition, the Judge erred by ordering Respondents to pay costs and expenses incurred by the Union in the preparation and conduct of collective bargaining negotiation sessions. This order is absurd and contrary to Board law. Specifically, the Board has ruled negotiating costs are warranted where an employer "engaged in flagrant, egregious, deliberate and pervasive bad-faith conduct aimed at frustrating the bargaining process, causing the union to waste its resources in a futile effort to bargain for an agreement, and rendering the bargaining between the parties "merely a charade." *See Frontier Hotel & Casino*, 318 NLRB 857, 858 (1995), enfd. in relevant part sub nom, *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. 1997). In *Frontier Hotel*, the Board held that a respondent can be required to reimburse a charging party for negotiation expenses if it engaged in unusually aggravated misconduct, and where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies. *Id. at 859.*

Applying that principle to the present case, the record fails to establish an award of negotiating costs to the Union is warranted. Respondents have not engaged in flagrant, egregious, deliberate or pervasive bad-faith conduct aimed at frustrating the bargaining process or causing the Union to waste its resources in a futile attempt at collective bargaining. Nor does the record show that Respondents' bargaining was merely a charade. Rather, the record shows

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Respondents met and bargained with the Union for over one year, met for 36 negotiation sessions, reached agreement on 170 different issues, and were unable to reach agreement on just a few remaining issues. Clearly, the negotiation sessions were fruitful and the parties made significant progress through the negotiation sessions. In fact, there is no way the Union can honestly argue the negotiations sessions were not fruitful; the Union cannot deny the negotiation sessions led to 170 tentative agreements which the Union signed. Similarly, the General Counsel also cannot, in good faith, argue Respondents should pay the Union's costs. Indeed, in the General Counsel's own post-hearing brief, it seeks an order requiring Respondents "to honor all tentative agreements previously reached between Respondents and the Union[.]" *See General Counsel's Post-Hearing Brief at 184.* Surely, even the General Counsel must agree the tentative agreements have value, otherwise they would not seek to have Respondents recognize the tentative agreements. Therefore, it is disingenuous for the General Counsel to seek an order requiring Respondents to accept all 170 tentative agreements, but also pay the Union's negotiation costs for 36 bargaining sessions (wherein the parties reached agreement on the 170 tentative agreements).

4. The Judge Erred in Issuing a Broad Cease and Desist Order

Likewise, based on the circumstances of this case, a broad cease and desist order was definitely not warranted. Specifically, in *Hickmott Foods*, 242 NLRB 1357 (1979), the Board explained the criteria for determining whether a broad cease and desist order is appropriate is as follows: "Such an order is warranted *only* when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental rights." (Italics added.) In *Five Star Manufacturing, Inc.*, 348 NLRB 1301 (2006), the Board added that the *Hickmott* test is also based on "the totality of circumstances." Moreover, in order to justify a broad cease and desist

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order, the Board must find that traditional remedies, including a narrow cease and desist order, are insufficient to address any violations by respondent. *See Amptech, Inc.*, 342 NLRB 1131 fn.3 (2004) enfd. (165 Fed. Appx. 435 (6th Cir. 2006)(rejecting request for broad cease and desist order.).)

In the present case, a broad cease and desist order was definitely not warranted. First, Respondents' conduct did not demonstrate a proclivity to violate the Act. Second, and more importantly, however, Respondents have not acted in a way that disregarded the employees' fundamental rights – in fact, quite the opposite is true. The employees have made it abundantly clear they do not want to be represented by the Union. Therefore, Respondents have simply acted accordingly. Third, there has been no showing that the traditional remedies are insufficient to remedy any violations by Respondent.

Finally, in a very recent case with more egregious facts than our own, the Board held that the "circumstances of the case did not warrant a broad cease and desist order," where respondent interrogated employees, solicited employees to sign decertification petitions, promised wage increases if employees repudiated the union, withdrew recognition from the union, failed to provide information to the union, and unilaterally changed terms and conditions of employment following withdrawal of recognition. *See Bentonite Performance Material, LLC*, 353 NLRB No. 75 (2008).

Clearly, the violations found in *Bentonite* are more severe and egregious than the violations alleged in the instant case. Yet, the Board found that a broad cease and desist order was not warranted under the circumstances in *Bentonite.* Accordingly, a broad cease and desist order is also not warranted in the instant case. *See also Ryan Iron Works, Inc.*, 332 NLRB 506 (2000)(reversing judge's decision to issue broad cease and desist order because respondent has

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not been shown to have a proclivity to violate the act or a general disregard for employees' fundamental statutory rights.).

III. CONCLUSION

For the foregoing reasons, Respondents take exception to several of the findings and conclusions in the Judge's Decision. In addition, through their exceptions and the accompanying Motion to Remand and Reopen the Record, Respondents also seek an opportunity to present additional evidence regarding the Union's loss of majority support.

For further argument on this matter, please refer to Respondents' Motion to Remand and Reopen Record filed on this same date.

DATED: Honolulu, Hawaii, October 28, 2009.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, dba PACIFIC BEACH HOTEL, Respondents, and HTH CORPORATION dba PACIFIC BEACH HOTEL, and KOA MANAGEMENT, LLC dba PACIFIC BEACH HOTEL, and PACIFIC BEACH CORPORATION dba PACIFIC BEACH HOTEL, and INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, Union.	CASE NOS.: 37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7482 37-CA-7484 37-CA-7488 37-CA-7537 37-CA-7550 37-CA-7587 CASE NO.: 37-CA-7470 CASE NO.: 37-CA-7472 CASE NO.: 37-CA-7473 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2009, the foregoing RESPONDENTS' EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION; RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S

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DECISION; CERTIFICATE OF SERVICE was electronically filed with OFFICE OF EXECUTIVE SECRETARY in Washington, D.C., and a copy of the same was hand delivered to:

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